No. 85-1288

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

IN RE ALL MAINE ASBESTOS LITIGATION (PNS CASES)

RAYMARK INDUSTRIES, INC., et al.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Did the lower court err in holding that the United States is entitled to assert the employer immunity provisions of the Longshore and Harbor Workers' Compensation Act and of the Maine Workers' Compensation Act as defenses to a third-party action arising out of an injury to a federal employee covered solely by the Federal Employees' Compensation Act?

II. Did the lower court err in holding that claims against vessel owners by shipbuilders and shiprepairmen for injuries sustained on navigable waters because of vessel owner negligence are not within the admiralty jurisdiction of the federal courts but instead are governed by state law?

PARTIES

The following were the parties in the matter of In re All Maine Asbestos Litigation (PNS Cases), Docket No. 84-1779:

Raymark Industries, Inc.;[1]

Owens-Illinois, Inc.;[2]

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[1]The parent corporation of Raymark Industries, Inc., is Raymark Corporation, Trumbull, Connecticut. Raymark Industries' only subsidiary that it does not wholly own is Daikin-R-M Co., Ltd., 1053-2 Kamiosatsu, Chitose City, Hokkaido, Japan.

[2]The subsidiary corporations of Owens-Illinois, Inc., One Sea Gate, Toledo, Ohio, that are not wholly owned, are Prudent Supply, Inc., 160 Glenwood Avenue, Minneapolis, Minnesota; O-I/Schott Process Systems, Inc., P.O. Box 2189, S.W. Blvd., Vineland, New Jersey; Cajas Corrugadas de Mexico, S.A., Rio Danubio No. 51, Col. Cuauhtemoc, (Footnote continued)

Owens-Corning Fiberglas Corp.;

H. K. Porter Company, Inc.;

(Footnote 2 continued)
Mexico 14, D.F. Mexico; Cajas Y Empagues del Pacifico, S.A., Rio Danubio No. 51, Col. Cuauhtemoc, Mexico 14, D.F., Mexico; Cristal Owens Plasticos Ltd., Av. Camino A Valparaiso 501, Fono 561021, Casilla 187, Chile; Emballages Laurent, A.A., Rue Thenard, 7100 Chalon/Saone, France; Inmuebles Heda, S.A., Mexico; Kimble Italiana, S.p.A., Via Montelungo N., 4 Casella Postale 243, 56100 Pisa, Italy; Kraft, S.A., Rio Danubio No. 51, Col. Cuauhtemoc, Mexico 14, D.F., Mexico; Libbey-St. Clair, Inc., 1250 James St., Wallaceburg, Ontario, Canada; Manufactura de Vidrio Planos, C.A., Apartado, de Correos, No. 38, LaVictoria, Edo Aragua, Venezuela; Owens-Illinois de Puerto Rico, P.O. Box 387, Vega Alta, P.R. 00762; Owens-Illinois de Venezuela, C.A., Apartado de Correos, No. 5278, Caracas, Venezuela; Papeteries d'Espaly, S.A.R.L., 43000 Espaly, France; P.T. Igar Jaya, Kawsan Industri, Pulogadung, P.O. Box 3496, Jakarta, Indonesia; Papeteries Etienne, S.A., 29, Avenue de Camaggue, BP 97, 13632 Arles, France; Sasaki-Owens Glass Co., Ltd., 2-6 Nihomhashi-Bakurocho, 2-Chomr Chuo-Ku, Tokyo 103, Japan; and Sun-Lily Co., Ltd., P.O. Box 83, Kasumigaseki, Tokyo 100, Japan.

Armstrong World Industries, Inc.;[3]

Fibreboard Corporation;[4]

Celotex Corporation;[5]

Southern Textile Corporation;

Cummings Insulation Co., Inc.;

Claremont Company, Inc.;

Pittsburgh Corning Corporation;

Eagle-Picher Industries, Inc.; and

United States of America.

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[3]The subsidiaries and affiliates of Armstrong World Industries, Inc., P.O. Box 3001, Lancaster, Pennsylvania, that are not wholly owned, are Armstar, Lenoir City, Tennessee; Armstrong-Nylex Pty. Ltd., Melbourne, Australia; and Inarco Limited, Bombay, India.

[4]The parent corporation of Fibreboard Corporation is La Pacific Corporation, 111 S.W. 5th Avenue, Portland, Oregon.

[5]The parent corporation of Celotex Corporation is Jim Walter Corporation, 1500 North Dale Mabry, Tampa, Florida.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A. infra, 1a - 36a) is reported at 772 F.2d 1023. The District Court's Supplemental Opinion and Order of the Court from which appeal was taken (App. B infra, 37a - 39a) is unreported. The opinion on which the Supplemental Opinion and Order was based (App. C. infra, 40a - 55a) is reported at 489 F. Supp. 1576. A related decision of the Court of Appeals, to which it referred as a "companion case," and on which it relied for much of its holding, Drake v. Raymark Industries, Inc., is reported at 772 F.2d 1007 and is set forth as Appendix D (56a - 122a).[6]

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[6]A separate Petition for a Writ of Certiorari has been filed in Drake (No. 85-1246), presenting some of the same issues presented in this petition.

JURISDICTION

The Judgment of the Court of Appeals was entered on September 18, 1985. Raymark's petition for rehearing and rehearing en banc was denied on October 30, 1985.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1) (1966).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are United States Constitution, Article III, section 2; 5 U.S.C. § 8116(c) (1980); 28 U.S.C. § 1346(b) (1965); 28 U.S.C. § 2674 (1965); 33 U.S.C. § 905 (1978) (current version at 33 U.S.C. § 905 (1978 & Supp. 1985)); 46 U.S.C. § 740 (1978); 46 U.S.C. § 742 (1978); 46 U.S.C. § 781 (1978);

46 U.S.C. § 782 (1978); and Me. Rev. Stat. Ann., Tit. 39, § 4 (1978). Those constitutional and statutory provisions are reprinted in Appendix F.

STATEMENT OF THE CASE

a. Facts

This petition involves more than 200 individual cases pending in the District of Maine in which current or former civilian shipyard employees of the United States seek damages from the Petitioners and various other manufacturers and distributors of asbestos-containing insulation products. The plaintiffs include shipfitters, welders, pipecoverers and indeed members of virtually every trade of shipyard workers. They allege that they suffered various illnesses as a result of being exposed to the Petitioners' asbestos

products during their employment at the Portsmouth Naval Shipyard (PNS), a government owned and operated facility, located in Kittery, Maine. The Petitioners in turn have filed a third-party complaint against the United States.[7]

The plaintiffs allege that their exposure to respirable asbestos occurred both on land and on vessels on navigable waters. The land-based exposure allegedly occurred in workshops at the yard where various types of asbestos

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[7]Because of the number of cases and parties involved and at the direction of the district court, the Petitioners filed a model third-party complaint which each Petitioner, if it so chooses, incorporates into its answer to each complaint arising out of PNS.

insulation were cut, molded or mixed. Some of the insulation had to be cut or shaped on board the vessels themselves to fit the ship's system involved. According to the plaintiffs' complaints, this cutting or shaping generated respirable dust. When vessels were brought to the yard for repair or overhaul the plaintiffs were required to remove old insulation from the ships' systems on which work was to be performed. The plaintiffs allege that this removal or "ripout" of old insulation created still greater quantities of respirable dust because the insulation had been damaged during use and because the insulation could be removed only by cutting, pounding and scraping.

Count VI of the Petitioners' third-party complaint, the only count

involved in this petition,[8] asserts claims against the United States as the owner and operator of the shipyard where the plaintiffs worked and as the owner of the vessels themselves. The third-party complaint alleges that the government was fully aware of any dangers associated with asbestos and of the conditions and hazards allegedly created during the removal, fabrication and installation of asbestos-containing insulation. The manufacturers allege that despite this knowledge, the government failed to warn the plaintiffs of the alleged hazards and failed to take readily available precautions, such as providing respir-

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[8]The Petitioners did not appeal the decision of the district court dismissing the remaining counts of their third-party complaints.

ators or adequate ventilation. According to the third-party complaint, this willful, wanton and reckless conduct was the primary cause of the plaintiffs' illnesses.

b. Legal Predicate

These third-party claims are predicated on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, the Suits in Admiralty Act (SIAA), 46 U.S.C. §§ 741-752, and the Public Vessels Act (PVA), 46 U.S.C. § 781-790. These statutes waive the sovereign immunity of the United States and in general subject it to liability as though it were a private person. For example, in the FTCA the United States consents to being sued in tort

> in the same manner and to the same extent as a private individual under like circumstances....

28 U.S.C. § 2674.[9] Because the extent of the waiver found in these statutes is controlled in part by the liability of a private individual under like circumstances, the courts employ a private party anologue to determine what, if any, duties of care the government owes and when it will or may be liable.

The alleged negligence of the government as the employer of the plaintiffs consists of, inter alia,

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[9]Similarly, under the SIAA, which by incorporation applies to claims under the PVA, 46 U.S.C. § 782, the United States waives sovereign immunity with respect to cases in which "if (the) vessel were privately owned, or if (the) cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742.

breaches of the duties to provide a safe place to work, to warn of latent dangers or health hazards in the workplace, and to provide safe equipment or materials for the work itself. Since these land-based duties are well recognized in Maine law, see Hurd v. Hurd, 423 A.2d 960 (Me. 1981), application of the private party anologue makes clear that they were owed by the United States to these plaintiffs.

It is alleged that, as vessel owner, the government is liable under maritime law for failing to warn these plaintiffs of the latent dangers posed by the extremely dusty conditions on the vessels and, particularly, of the latent dangers allegedly posed by the "rip-out" of the asbestos insulation covering the pipes, boilers, machinery and ductwork of the vessels brought to the yard for repair. The shipowner's duty to warn of

hidden dangers that will be encountered by those legitimately on board the vessel is well settled in maritime law and the decisions of this Court. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981); West v. United States, 361 U.S. 156 (1961).

Finally, the right to contribution and indemnification has a long and venerable history under both Maine law, see Packard v. Whitten, 274 A.2d 169, 179 (Me. 1971); Hobbs v. Hurley, 117 Me. 449, 104 A. 815 (1918), and, as the First Circuit has acknowledged (Drake, App. D, 70a, 772 F.2d at 1011), maritime law, see, Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974). Under both bodies of law the third-party's rights are based on the equitable premise that a tortfeasor's liability should be limited to his proportionate share of the causative fault. See United States v.

Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975); Packard v. Whitten, 274 A.2d at 180.

Although the government has raised several factual and legal defenses to this third-party action, only one, strictly legal defense is involved given the present posture of this case; namely, the nature and scope of the United States' immunity from third-party tort liability under 5 U.S.C. § 8116(c), 33 U.S.C. §905, or Me. Rev. Stat. Ann., Tit. 39, § 4 as the employer of the plaintiffs.

c. Jurisdiction of Court of Original Jurisdiction

Petitioners' third-party complaint against the United States invoked the federal courts' exclusive jurisdiction over suits against the United States. See 28 U.S.C. § 1346(b); 46 U.S.C. § 782.

d. Decisions Below

The First Circuit acknowledged that this Court's decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), establishes that the FECA's exclusive liability provision, 5 U.S.C. § 8116(c), does not bar the Petitioners' third-party claims. (App. A., 14a, 772 F.2d at 1027). The FECA is, of course, the only compensation scheme under which any of these plaintiffs has received or could receive benefits. Nevertheless, the First Circuit employed the FTCA's private party anologue to rule that the government is entitled to assert not only its own FECA immunity, but also whatever employer immunity would be available to an "analogous private party." The court concluded that the analogous private party was a private shipyard in Maine that owns its own vessels. The First Circuit then simply adopted its decision

in the "companion case" of Drake v. Raymark Industries, Inc., 772 F.2d 1007, which involved third-party claims against such a shipyard, as establishing the government's employer immunity in these cases. (See App. A, 19a, 27a, 772 F.2d at 1030, 1031.)

Because of the First Circuit's method of analysis, this Petition raises two distinct, important federal questions. The first question, which involves the interrelationship of the FTCA and the FECA, asks whether the United States is entitled under the FTCA to assert employer immunities that derive from workers' compensation schemes in which the government does not participate. The First Circuit's answer to that question, which was that the United States, for FTCA purposes, is like a private shipyard and is entitled to whatever workers' compensation defenses

such a shipyard would have, gives rise to the second important federal question; namely, whether the First Circuit's opinion in Drake, which was simply adopted below, correctly construes the defenses available to the analogous private shipyard. In order to understand the nature of this second question, a brief review of the facts and the opinion in Drake itself is required.

Forrest Drake was employed as a pipecoverer by Bath Iron Works (BIW), a private shipyard located in Bath, Maine. He and many of his co-workers filed against the Petitioners complaints that are essentially the same as those filed in these cases by the federal employees. The manufacturers in turn filed third-party complaints against BIW alleging that it had breached duties it owed under Maine law as Drake's employer and also maritime duties of care it owed as the

owner of the vessels on which Drake worked.[10]

In Drake, which was selected by the Honorable Judge Edward T. Gignoux, Senior District Judge, as a test case to determine the viability of those third-party claims, the First Circuit held that the claims were barred by BIW's employer immunity. The Drake panel reasoned that because BIW employees are covered under both the Longshore and Harbor Workers' Compensation Act (LHWCA) and the Maine Workers' Compensation Act

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[10]Aside from the fact that BIW actually was a covered employer under the Maine Workers' Compensation Act (MWCA), Me. Rev. Stat. Ann., Tit. 39, §§ 1-195 and the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, the only distinction between BIW and the government is that BIW allegedly was vessel owner pro hac vice of vessels at its yard, whereas the government is the actual owner of the vessels constructed and repaired at PNS.

(MWCA), BIW is entitled to assert each act's employer immunity provision. Because this Court in Lockheed seemed to make clear that section 8116(c) and section 905(a) of the LHWCA should be construed identically, the petitioners contended in Drake that section 905(a) could not be interpreted to bar the third-party claims. The First Circuit, however, relying on the very cases discussed and distinguished by this Court in Lockheed in reaching the opposite conclusion, held that section 905(a) directly bars the Petitioners' third-party claims. (See Drake, App. D, 114a, 121a, 772 F.2d at 1020-22.)[11] Although the Drake

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[11]The term "directly" is the key to understanding the importance of the First (Footnote continued)

panel also indicated that section 4 of the MWCA directly bars the land-based claims, the court did not resolve the

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(Footnote continued)
Circuit's interpretation of section 905(a). In many jurisdictions the employer's immunity from a third-party claim for contribution or indemnity does not spring directly from the applicable immunity provision but rather indirectly from the law of contribution and indemnity itself. Many states require joint liability to the plaintiff as an element of a claim of contribution or tort indemnity against the third-party defendant. Thus, in these states, since the employee cannot sue his employer in tort, neither can any defendant, because the absence of joint liability to the plaintiff/employee defeats all contribution or tort indemnity claims. 2A A. Larson, The Law of Workmen's Compensation § 76, at 14-561 (1983). Maine, however, does not require joint liability to a plaintiff as an element of a contribution/indemnity claim. Otis Elevator Co. v. F. W. Cunningham, 454 A.2d 335, 337 (Me. 1983); Bedell v. Reagan, 159 Me. 292, 298, 192 A.2d 24, 27 (1963). Thus, to defeat Raymark's state-law claims against BIW, the First Circuit had to, and did, find a direct bar against such claims in section 905(a). (See Drake, App. D, 114a, 121a, 772 F.2d at 1021-22.)

question whether section 4 could be so applied if section 905(a) had not also barred those claims. (Drake, App. D, 121a, 772 F.2d at 1022.)

With respect to the vessel owner claim, the Drake panel recognized that since section 905(b) of the LHWCA expressly permits a ship contruction or repair worker's suit against his employer as vessel owner, BIW could be liable if its negligence as vessel owner was governed by section 905(b). Indeed, even before the enactment of section 905(b) in 1972, the employer, as vessel owner, was liable in tort for injuries sustained on board the vessel by an employee. Jackson v. Lykes Bros. Steamship Co., Inc., 386 U.S. 731 (1967); Reed v. The Yaka, 373 U.S. 410 (1963). Section 905(b) simply preserved in the LHWCA context this traditional exception to employer

immunity, but limited all vessel owners' liability for injuries to LHWCA-covered employees to actions based on negligence. See Jones & Laughlin Steel Corp. v. Pfeiffer, 462 U.S. 523 (1983).

The Drake panel held that this exception to employer immunity is limited to maritime torts, that is, to torts cognizable under the admiralty jurisdiction of the federal courts. Because the manufacturers' claims in Drake alleged breaches of duties owed solely to Drake, the First Circuit reasoned that whether the third-party claims are maritime turns on whether a suit by Drake against the vessels would satisfy the two-prong test for admiralty jurisdiction first enunciated by this Court in Executive Jet Aviation Corp. v. City of Cleveland, 409 U.S. 249 (1972). Since it was undisputed that the situs of Drake's exposure to asbestos and

resulting injuries was the navigable waters of the United States, the First Circuit considered the dispositive question to be whether a claim by Drake against the vessels on which he worked would bear a sufficient relationship to traditional maritime activities so as to satisfy the "nexus" half of the Executive Jet formulation. Relying on Drake's job duties, the First Circuit held that the nexus requirement was not satisfied and that ship repair and construction workers' claims of vessel owner negligence therefore are non-maritime claims governed by state law rather than by section 905(b) or maritime law. (See App. D, 88a, 94a, 772 F.2d at 1015-16.) The Court accordingly concluded that the claims of vessel owner negligence, like the other state-law claims, were directly

barred by section 905(a) and by section 4 of the MWCA.

Having concluded that for FTCA purposes, the United States is like BIW, the All Maine panel simply adopted this rationale as applicable to the third-party claims arising out of the vessel owner negligence that caused these federal employees' illnesses. The plaintiffs' relevant exposure clearly occurred on navigable waters, but since they all were ship repair or construction workers, the Court was satisfied that claims by them against the vessels on which they worked would be non-maritime, state law claims. In denying Raymark's petition for rehearing in this case, the First Circuit again stated that in its view the duty owed by vessels to ship repair and construction workers is

"better ... left to state tort law." (App. E, 124a.) Since maritime law would not apply to a vessel owner suit brought by these plaintiffs, it likewise did not apply to the Petitioners' third-party vessel-owner claims.

In short, the First Circuit ruled that the United States is entitled to assert as a direct bar to these third-party claims not only its own immunity under the FECA but also the immunities found in section 905(a) of the LHWCA and in section 4 of the MWCA. Although none of these defenses would bar these third-party claims of vessel owner negligence if the claims were deemed maritime in nature, the First Circuit concluded that the government's negligence as vessel owner is a matter of

state, not maritime law.[12]

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[12]The district court discussed only the vessel owner claim. The court concluded that that claim was barred by neither section 8116(c) of the FECA, nor section 905(a) of the LHWCA. (App. B, 42a - 43a, 589 F. Supp. at 1573-74.) Without explanation and despite having acknowledged in another opinion that section 905(b) might preempt any state exclusive liability provision, see In re All Maine Asbestos Litigation (BIW Cases), 589 F. Supp. 1563, 1569 n. 6 (D. Me. 1984), the district court indicated that section 4 of the MWCA might be used to bar the vessel owner claim. The court, however, reserved for possible certification to the Maine Supreme Judicial Court the question whether Maine recognizes a dual capacity exception to employer immunity. The district court therefore refused to dismiss Count VI, but granted the government's request that the decision be certified for interlocutory appeal (App. B, 39a). Obviously, the First Circuit employed an entirely different rationale in concluding that Count VI fails to state a claim.

REASONS FOR GRANTING THE WRIT

I. A Decision by this Court is Necessary to Resolve an Important Question of Federal Law Certain to Recur Because of This Court's Decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983); Namely, Whether, in a Case Involving Injury to a Federal Employee, the United States is Entitled to Raise as a Defense the Employer Immunity Provisions of State Workers' Compensation Acts and of the Longshore and Harbor Workers' Compensation Act.

The lower court's decision raises important questions of federal law about the interrelationship between the waiver of sovereign immunity found in the FTCA and the employer immunity of the United States under the FECA. Since the gist of the waiver of immunity found in the FTCA is that the United States consents to bear the same liability as would a private party under similar circumstances, 28 U.S.C. § 2674, the threshold questions in any FTCA suit would seem to be who is the "analogous private party"

for FTCA purposes, what causes of action could be asserted against him, and what defenses would be available to him against the claims. Given the terms of the FTCA's waiver of sovereign immunity, the answers to these questions will, in most cases, determine the nature and scope of the United States' liability.

In cases such as the instant one, however, where third-party claims arising from injuries to federal employees are asserted against the United States, the answer to the third or "defenses available" question becomes problematical. Historically the United States has always raised section 8116(c) as a defense to such suits. See Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983). The right of the United States to interpose section 8116(c) in defense has never been questioned even though this defense could never be available to the

FTCA's "analogous private party" since no private employer is subject to the FECA. Ironically, in suits arising from injuries to federal employees, the United States has never, until recently, raised in defense the employer immunities available to private employers under state compensation acts or the LHWCA, even though such defenses would be available to the "analogous private party" in a suit arising from injuries to a private employee.

Undoubtedly because of this Court's holding in Lockheed that section 8116(c) does not directly bar third-party tort actions against the United States by persons wholly unrelated to the federal employee, the United States in the instant case claimed the additional protection of the LHWCA and the MWCA under the theory that the protection provided by these compensation schemes

would be available to a private shipyard employer operating in Maine. After reasoning that a private Maine shipyard was the appropriate "analogous private party" for FTCA purposes and that such a shipyard would be covered by both the LHWCA and the MWCA, the lower court held that the United States could assert LHWCA and MWCA defenses and that these defenses barred the third-party claims. (App. A, 21a - 22a, 772 F.2d at 1028-1029.) In so doing the First Circuit afforded the United States three employer immunity defenses to the third-party claims (FECA, LHWCA and MWCA), despite its established rule that the FECA alone controlled such third-party actions. Newport Air Park, Inc. v. United States, 419 F.2d 342 (1st Cir. 1969).

The First Circuit's decision greatly complicates all FTCA claims arising from injuries to federal employees. One can

now expect a parade of statutory acronyms in future judicial opinions as the United States reaches out to grasp the protections of the workers compensation acts of the several states and of the LHWCA where appropriate. With the state act employer immunity provisions will come the variety of curious and arcane exceptions to immunity that fill an entire volume of Professor Larson's authoritative treatise. 2A A. Larson, The Law of Workmen's Compensation (1982). As this Court noted in Lockheed, the issue of employer immunity from third-party suits is not settled but remains, in the words of Professor Larson, "(p)erhaps the most evenly balanced controversy in all of workers' compensation law." Lockheed Aircraft Corp. v. United States, 460 U.S. at 193 n. 3. Thus, the employer immunity of the United States from suits involving

injuries to one of its own employees must now, under the First Circuit's analysis, vary from state to state depending on which side of the "balanced controversy" the particular state compensation law falls.

The First Circuit's use of the FTCA to import the LHWCA and the MWCA into these FECA cases violates Congressional intent because it renders section 8116(c) either meaningless or redundant for most cases. By 1949, when section 8116(c) was added to the FECA, every state had a workers' compensation scheme in place that provided benefits for employees and some protection from suit for employers. See, 1 A. Larson, The Law of Workmen's Compensation § 5.30 (1978); and 2A id. § 65.11. Congress, however, being concerned over the proliferation of employee suits against the United States after the passage of the FTCA in 1946,

nonetheless thought it necessary to pass section 8116(c) for the explicit purpose of protecting the United States from tort judgments in favor of federal employees.[13] Obviously, both the proliferation of lawsuits and the Congressional decision to stem it by the enactment of section 8116(c) demonstrate that neither the judicial nor the legislative branches of that era ever envisioned that the United States could claim the protection of the local workers' compensation acts then in effect. Indeed, Congress' prompt decision to intervene legislatively in the FTCA litigation by enacting section 8116(c) establishes its intent that that

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[13] See S. Rep. No. 836, 81st Cong., 1st Sess. (1949), reprinted in 1949 U.S. Code Cong. Serv. 2125; H. Rep. No. 729, 81st Cong., 1st Sess. (1949); see also 95 Cong. Rec. 10804-10805 (1949).

statute alone should govern the United States' liability in suits arising from injuries to federal employees.

A Congressional intent that section 8116(c) alone should govern the United States' immunity in suits arising from injuries to federal employees may also be gleaned from the nature and structure of the FECA itself. As this Court noted in Lockheed, the FECA and, indeed, all workers' compensation acts, have as their foundation a quid pro quo compromise between employer and employee. Lockheed Aircraft Corp. v. United States, 460 U.S. at 194, 196-197. The employer agrees to pay a set schedule of benefits to injured employees in exchange for an immunity from tort suit by the employee or for a limitation of liability in tort for damages sustained by the employee. Thus, the compromise established by Congress is that the United States receives only the

protection of section 8116(c). Had Congress wished to provide a greater or a different protection it would have done so, and could have done so easily. The United States should not be allowed to receive the protections of different compromises struck by different legislatures in response to the economic needs of a particular state and struck, no doubt, only after intense input from local businesses, unions, and the insurance industry. The same analysis holds true for the LHWCA, where the compromise was struck by Congress in response to the needs of a particular industry. Lockheed Aircraft Corp. v. United States, 460 U.S. at 198.

Thus, the chief flaw in the lower court's analysis is its failure to distinguish for FTCA purposes between defenses like statute of limitations, contributory negligence, or assumption of

risk and defenses like employer immunity. The former class of defenses is simply given to all tortfeasors by state law, and, as such, should be available to the United States under the FTCA. Employer immunity, however, is not given. It is purchased by the payment of compensation benefits in accordance with the benefit schedule of the particular compensation act. Since the United States has not "purchased" LHWCA and MWCA protection, the "analogous private party" is a shipyard that also did not purchase the protection of these acts. Of course, an employer who does not pay the benefits required under the LHWCA or the MWCA simply has no immunity under these acts and may be sued in tort by the employee and others. 33 U.S.C. § 905(a); and 39 M.R.S.A. § 21A.

A decision by this Court is necessary to forestall the confusion that must

result from the First Circuit's decision to afford the United States as employer the protection of the LHWCA and the MWCA. Prior to Lockheed the United States' immunity from third-party suits arising from injuries to federal employees was a matter solely of federal law to be determined under the FECA. Travelers Ins. Co. v. United States, 493 F.2d 881 (3d Cir. 1974); Galimi v. Jetco, Inc., 514 F.2d 949 (2d Cir. 1975); and Newport Air Park, Inc. v. United States, 419 F.2d 342. It should be noted that the First Circuit was unable to cite any pre-Lockheed case involving injuries to a federal employee in support of its decision. Thus, as the instant case shows, in response to this Court's holding in Lockheed the United States has argued for and received the protection of state compensation acts and the LHWCA under the guise of the FTCA. See also

Colombo v. Johns-Manville Corp., 601 F. Supp. 1119 (E. D. Pa. 1984); and In re All Asbestos Cases, 603 F. Supp. 599 (D. Ha. 1984).

There is little doubt that the question whether the United States can claim the protection of local workers' compensation acts or of the LHWCA, where appropriate, will recur frequently in the years ahead. In the instant case the First Circuit, relying on Lockheed, recognized that section 8116(c) of the FECA does not directly bar the Petitioners' claims. (App. A, 14a, 772 F.2d at 1027.) The lower court barred the Petitioners' claims only under 33 U.S.C. § 905(a) and 39 M.R.S.A. § 4. (App. A, 22a, 772 F.2d at 1029.) It is apparent, therefore, that because of this Court's holding in Lockheed, section 8116(c) of the FECA is viewed as providing less protection to the United

States as employer than would the comparable provisions of some local compensation acts or of the LHWCA. It is logical to expect the United States to seek what it views as better defenses wherever possible under the authority of the "analogous private party" doctrine of the FTCA as construed by the First Circuit in the instant case. Thus, in every case involving injury to a federal employee where the United States is joined as a third-party defendant, including the thousands of asbestos-related disease cases filed by federal workers across the country, the issue of what employer immunity defenses apply will be raised and decided. The instant case affords this Court a clear opportunity to resolve this issue now.

II. The Decision Below Misapplies the Test For Admiralty Jurisdiction Enunciated by this Court in Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972), and Creates a Conflict Among the Circuits on the Issue Whether Shipyard Workers' Claims Against the Owners of the Vessels on Which They Work are Within the Admiralty Jurisdiction of the Federal Courts.

The key to understanding the First Circuit's disposition of the Petitioners' third-party claims against the United States in its capacity as owner of the vessels on which the plaintiffs worked is the "analogous private party" doctrine of the FTCA and the PVA. As explained above, the First Circuit held that the private party most analogous to the United States would be a private shipyard operating in Maine that owned the vessels being built or repaired at the yard. The "analogous private party" being so defined, the First Circuit concluded that the nature and scope of the United States' liability as vessel owner was

virtually indistinguishable from the vessel owner liability of Bath Iron Works (BIW), a private Maine shipyard and vessel owner pro hac vice, and the third-party defendant in the companion case of Drake v. Raymark Industries, Inc., 772 F.2d 1007.

Once the "analogous private party" doctrine had been applied to, in effect, convert the United States into BIW for analytical purposes, the rationale of the First Circuit's dismissal of the Petitioners' third-party, vessel-owner claims against the United States was exactly that used in Drake. (App. A, 27a - 31a, 772 F.2d at 1030-31.) In Drake the First Circuit focused on the availability of shipyard worker claims against vessel owners under 33 U.S.C. § 905(b). The Court reasoned that neither the employee nor any third-party could bring a section 905(b) claim unless

that claim would lie within the admiralty jurisdiction of the federal courts as defined by this Court's test for admiralty jurisdiction enunciated in Executive Jet Aviation v. City of Cleveland, 409 U.S. 249 (1972). (Drake, App. D., 84a, 772 F.2d at 1014.) Since the third-party claims are predicated on the breach of a duty owed by the vessels to Drake, the court reasoned that the critical question was whether a claim by Drake against the vessels on which he worked would be cognizable in admiralty. (App. D, 84a, Drake, 772 F.2d at 1014.) In these 200 cases, as in Drake, the court focused on the nature of the work done by the plaintiffs and concluded that claims by such workers against the vessels on which they worked could not pass muster under the nexus requirement of the Executive Jet test. Accordingly, the court dismissed the Petitioners'

third-party, vessel-owner claims. (App. A, 28a, 772 F.2d at 1030; Drake, App. D, 94a, 772 F.2d at 1016.) Since the First Circuit's rationale will apply to virtually all shipyard workers, the clear issue posed by the instant case is whether claims by such workers against the owners of the vessels on which they work for personal injuries caused by vessel owner negligence are maritime in nature.

In concluding that the nexus requirement was not met, the Court relied on those cases, including one of its own, that hold that claims by shipyard workers against the manufacturers of asbestos insulation products are not maritime in nature. (App. A, 28a, 772 F.2d at 1030; Drake, App. D, 88a, 772 F.2d at 1015.) See Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984); Lowe v. Ingalls Shipbuilding, 723 F.2d

1173 (5th Cir. 1984); Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983), cert. dismissed, 463 U.S. 1247 (1983); Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), cert. denied, 464 U.S. 864; Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983); and Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir. 1985).

Although these cases are correctly decided, it is clear that the First Circuit's reliance on them is misplaced. This Court's analysis in Executive Jet was intended to apply in situations where the occurrence of the injury on navigable waters was "wholly fortuitous" in relation to the wrong that gave rise to the injury sustained. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. at 266. Since the wrong alleged

here is the vessel's negligent failure to warn of a latent danger on the vessel itself and the failure to protect maritime workers against that danger, the occurrence of the injury on board ships in navigable waters is in no way fortuitous in relation to the tortious conduct alleged. Where the tortfeasor is a vessel in navigable water and the alleged wrong relates to the vessel's condition, the tort is intrinsically maritime in the most traditional sense of the term. Vessels are the very stuff of all maritime concerns, and few legal truisms have been more consistently stressed by this Court than the proposition that vessel owner negligence gives rise to a maritime tort. See, e.g., Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982); West v.

United States, 361 U.S. 118 (1961); and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

The claims against asbestos insulation manufacturers, however, typically assert that their products were defectively manufactured, labelled or marketed. The "wrong," if any, in such claims occurs far from the sea in the plants where the products are made, packaged and shipped. Obviously, whether this alleged "wrong" causes an injury on navigable water is wholly fortuitous since the insulation products in question can as easily end up on the pipes or boilers of an office building heating system or in a power plant as on the steam pipes of a ship.

The need for uniformity, which is a prime motive for the application of maritime law to vessel owners, is

virtually non-existent in the case of land-based manufacturers. Historically, the state law of negligence, product liability, or warranty has always governed the duties of the manufacturer. Indeed, the rights of the several states to provide remedies for their citizens against those selling products within their borders have never been questioned. The duties of the vessel owner, however, whose activities take him from port to port, historically have been the sole province of the maritime law to the exclusion of land-based theories of recovery. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156; and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. at 628 (finding error in application of state law to claim of vessel owner negligence made by visitor on board vessel in port).

In fact, in the instant case and in Drake it is clear that the lower court has, in effect, supplanted the nexus requirement and installed a type of status test. In denying admiralty jurisdiction to the vessel owner claims in Drake, the First Circuit borrowed part of its reasoning in Austin v. Unarco Industries, Inc., supra, and focused almost exclusively on the nature of the work performed by the shipbuilder or shiprepairman.

> In Unarco, we focused on the nature of the decedent's job rather than the type of project -- vessel construction or repair -- on which he worked. We concluded that the plaintiff was entitled to invoke admiralty only if the decedent was 'injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen.' 705 F.2d at 12. We ruled that because the decedent had been engaged in work 'requiring special equipment and skills' not commonly found among the members of the ship's crew, admiralty law was not applicable to plaintiff's claims.

Drake, App. D, 88a - 89a, 772 F.2d at 1015.

This language, of course, derives from this Court's decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).[14] Thus, the plain import of the First Circuit's decision in the

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[14]Sieracki involved a personal injury suit by a longshoreman against the vessel he was hired to unload. The question before the Court, of course, was not whether the action was cognizable in admiralty, but rather whether the vessel's warranty "of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore (longshoreman) injured while working aboard the ship," Seas Shipping Co. v. Sieracki, 328 U.S. 85, 87 (1946), thereby rendering the vessel owner strictly liable to that worker. The Court concluded that Sieracki was entitled to the remedy because a longshoreman performs "a seaman's work and incur(s) a seaman's hazards." Id. at 99.

instant case is that a maritime remedy against the vessel owner is available only to those shipyard workers who do work formerly done by the ship's crew itself, a class which in maritime parlance has come to be called "Sieracki-seamen." See Gilmore and Black, The Law of Admiralty, 440-41 (2d ed. 1975).

By limiting maritime remedies against the vessel owner to those doing work traditionally done by the ship's crew, the First Circuit has ignored the nexus test, which focuses on the nature of the wrong, and has raised a status barrier, which focuses instead on the victim of the wrong, to the availability of admiralty jurisdiction. Since under modern shipbuilding and ship repair practice most workers must possess specialized skills and use specialized

equipment, the effect of the First Circuit formulation will be to deny maritime remedies to most shipyard workers.

As the First Circuit acknowledged in Drake, its decision on the scope of admiralty jurisdiction brings it into sharp conflict with the Fifth Circuit's decision in Hall v. Hvide Hull No. 3, 746 F.2d 294 (5th Cir. 1984), reh'g. denied, 753 F.2d 1075 (5th Cir. 1985). The Hall panel addressed the question whether a LHWCA-covered ship construction worker injured by the negligence of a floating hull had a section 905(b) claim that was cognizable in admiralty. Relying on this Court's decision in Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. 297, 320 n. 29 (1983), as to the broad scope of admiralty jurisdiction under the LHWCA,

the Hall panel held that Executive Jet could not be applied to defeat federal admiralty jurisdiction over a covered employee's negligence claim against a vessel, including vessels under construction on navigable waters. Hall v. Hvide Hull No. 3, 746 F.2d at 303.

The First Circuit Court also noted in Drake that its ruling conflicts with two other decisions, Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981); and McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983), cases that the First Circuit concluded had overlooked the Executive Jet nexus requirement in determining whether the section 905(b) remedy is available. Though not specifically referred to by the First Circuit, several other decisions also apply section 905(b) to harbor workers who use specialized skills and equipment not typically

thought of as maritime.[15] These

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[15]Other cases in which section 905(b) has been applied to LHWCA-covered employees who apparently would not satisfy the First Circuit's "nexus" test include the following:

Fourth Circuit: Allied Towing Corp. v. Tatem, 580 F.2d 702 (1978) (applying section 905(b) to ship repair workers' claims of vessel owner negligence against their employer/vessel owner);

Fifth Circuit: Hill v. Texaco, Inc., 674 F.2d 447 (1982) (applying section 905(b) to negligence claim against vessel brought by LHWCA-covered employee using ultrasonic testing equipment to determine effect of rust on an oil tanker's walls); Stass v. American Commercial Lines, Inc., 720 F.2d 879 (1983) (applying section 905(b) to claim by shipfitter); Duplantis v. Zigler Shipyards, Inc., 692 F.2d 372 (1982) (applying section 905(b) and apparently admiralty jurisdiction to claims by shipyard employees injured by explosion during major repairs of tank barge).

District Courts: Savoy v. United States, 469 F. Supp. 301 (E. D. La. 1978) (applying section 905(b) to claim of shipyard employee engaged in overhaul of decommissioned naval vessel); Kalogeros

(Footnote continued)

decisions implicitly confirm the holding in Hall that any injury to an LHWCA-covered employee caused on navigable waters by the negligence of the vessel on which he was working necessarily satisfies the requirements for admiralty jurisdiction.

Although Hall and the other cases cited involved claims by LHWCA-covered workers, it is clear that their rationale

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(Footnote 15 continued)
v. Brasileiro, 446 F. Supp. 175 (S.D.N.Y. 1978) (applying section 905(b) to claim of vessel owner negligence brought by machine works employee hired to repair vessel's engine room); Harrelson v. United States, 420 F. Supp. 788 (S. D. Ga. 1976), affirmed, 548 F.2d 353 (5th Cir. 1977) (applying section 905(b) to machinist's claim of vessel owner negligence arising during overhaul of naval tanker); DiLorenzo v. Robert E. Lee, Inc., 412 F. Supp. 1012 (E. D. La. 1976) (applying section 905(b) to ship construction worker's claim of vessel owner negligence).

applies with equal force in the instant case. Since these cases extend admiralty jurisdiction to LHWCA-covered shipyard worker claims against private vessel owners, admiralty jurisdiction should also embrace similar claims against the United States as vessel owner, especially when viewed in light of the "analogous private party" doctrine of the FTCA and PVA as construed by the First Circuit.

A decision by this Court is needed to resolve the conflict among the circuits on the scope of admiralty jurisdiction and to enforce a rigorous application of the Executive Jet test. The First Circuit's novel proposition that whether a vessel poses an unreasonable danger to those legitimately on board is "better ... left to state law" (App. E, 124a) not only portends but constitutes a dangerous and unwarranted erosion of the admiralty jurisdiction of the federal courts. The

creation of the "Sieracki-seaman" status test for admiralty jurisdiction will deny most shipyard workers a maritime remedy.

RELATED CASE

Some of the issues raised in this petition are currently before the Court in Drake v. Raymark Industries, Inc., 772 F.2d 1023 (1st Cir. 1985), petition for cert. filed, ____ U.S. ____ (Jan. 21, 1986) (No. 85-1246). As noted above (at pp. 17 - 25), that case involves the viability of Petitioners' third-party claims against the owner of a private, as opposed to a government, shipyard. The Petitions in Drake and in the instant case seek this Court's review, inter alia, of the First Circuit's unprecedented ruling that a shipowner's duties to vessel workers are governed by state tort law. Moreover, given the controlling weight accorded to Drake in

these cases, the Petitions would appear ripe for consolidation.

CONCLUSION

The issues raised by the decision below merit the scrutiny of this Court. The First Circuit's holding that the United States is entitled to claim the employer immunity defenses of state compensation acts and of the LHWCA under the "analogous private party" doctrine of the FTCA is unprecedented in the forty-year history of this waiver of sovereign immunity. The importance of this ruling is best appreciated when one realizes that because of it section 8116(c) of the FECA becomes meaningless for most third-party claims against the United States and that under it all prior judicial interpretations of that section and its effect on such claims become largely academic. The United States will

simply reach out for the protections afforded private employers under state acts or for the protection of the LHWCA, where appropriate, whenever its immunity as established by Congress seems inadequate for the case.

The denial of maritime status to shipyard employee claims against the vessels on which they work is also without precedent. Few classes of workers have more frequent contact with vessels than those who labor to build or repair them, yet, under the First Circuit's analysis, this worker has no maritime remedy when he is injured on board by the negligence of the owner.

The Petitioners urge this Honorable Court to grant the Petitions for Writ of Certiorari filed in this case and in the companion case of Drake v. Raymark Industries, Inc., 772 F.2d 1007, cert. filed (Jan. 21, 1986)(No. 85-1246) and to

consolidate the cases. If the Court does so, it will have a unique opportunity to rule authoritatively on the many issues now confronting the lower courts as a result of Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), and on the availability of maritime remedies for a large class of maritime workers.

Respectfully submitted,

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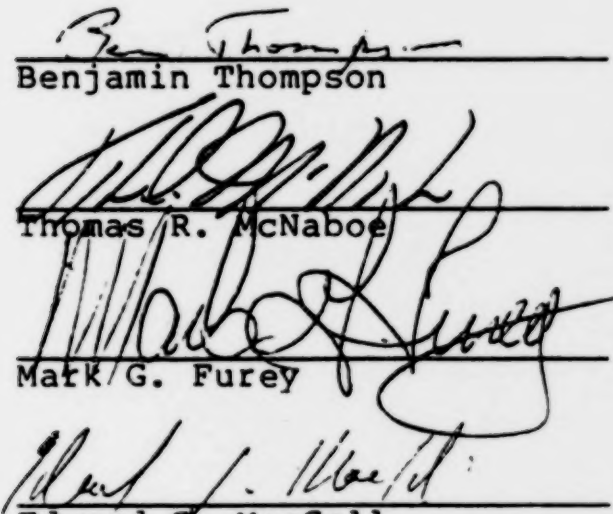
THOMPSON, McNABOE & ASHLEY



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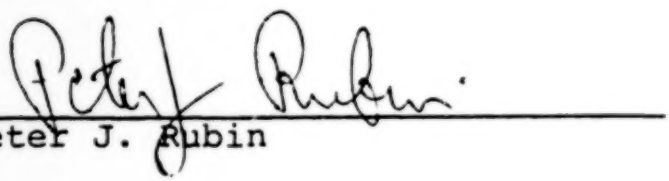

Peter J. Rubin

CERTIFICATE OF SERVICE

I, Benjamin Thompson, Esq., certify that on the 28th day of January, 1986, I mailed, postage prepaid, forty (40) copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit to the Clerk of the Supreme Court of the United States, One First Street NE, Washington, D.C. 20543, and mailed three (3) copies, postage prepaid, to the Solicitor General, U.S. Department of Justice, Constitution Avenue and Tenth Street NW, Washington, D.C. 20530, attorney for Respondent United States of America; and three (3) copies, postage prepaid, to Peter J. Rubin, Esq., Bernstein, Shur, Sawyer and Nelson, One Monument Square, Portland, Maine 04101, attorney for Owens-Corning Fiberglas Corp., Pittsburgh Corning Corporation and Eagle-Picher

Industries, Inc.; and three (3) copies to Frederick C. Moore, Esq., Robinson, Kriger & McCallum, 12 Portland Pier, Portland, Maine 04112, attorney for Cummings Insulation Co., Inc. and Claremont Company, Inc.

Benjamin Thompson

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1779

IN RE ALL MAINE ASBESTOS LITIGATION
(PNS CASES)

UNITED STATES OF AMERICA,

Petitioner.

APPEAL FROM THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF MAINE

[Hon. Edward T. Gignoux,
Senior U.S. District Judge]

Before

Coffin, Bownes and Torruella,

Circuit Judges.

Joseph B. Cox, Jr., Torts Branch, Civil Division, U.S. Department of Justice, with whom David S. Fishback, Torts Branch, Civil Division, U.S. Department of Justice, Harold J. Engel,

Assistant Director, Peter A. Mowinski, Special Litigation Counsel, Richard S. Cohen, United States Attorney, and Richard K. Willard, Acting Assistant Attorney General, were on brief for petitioner. Jeffrey Silberfeld with whom Rivkin, Leff, Sherman and Radler, James G. Goggin and Verrill and Dana were on brief for Pittsburgh Corning Corporation.

Mark G. Furey with whom Thomas R. McNaboe and Thompson, McNaboe and Ashley were on brief for Raymark Industries, Inc.

Edward M. Fogarty with whom Donald W. Fowler, Joe G. Hollingsworth, William J. Spriggs, Spriggs, Bode & Hollingsworth, John R. Linnell and Linnell, Choate & Webber were on brief for Eagle-Picher Industries, Inc.

September 18, 1985

BOWNES, Circuit Judge. This interlocutory appeal regarding third-parties' claimed right to proceed against the United States for noncontractual indemnity or contribution constitutes one more step toward a determination of who shall be ultimately liable for the injuries to workers resulting from their exposure to asbestos in the Portsmouth Naval Shipyard (PNS). All of the workers whose injuries are the subject of the primary actions in this portion of the Maine asbestos cases are present or former civilian federal employees of PNS located at Kittery, Maine. In numerous individual actions,[1] the workers or their representatives (plaintiffs), sued twenty-six manufacturers and distributors (defendants) for occupational disease or wrongful death

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1. The district court declined to certify any class actions.

caused by their exposure to asbestos dust that was created by the manufacturers' asbestos products. This exposure allegedly occurred while the workers were performing construction or repair work on U.S. naval vessels.

According to the complaints, plaintiffs seek to recover compensatory and punitive damages for injuries caused by the breach of required duties of care. Specifically, plaintiffs charge the defendant manufacturers with failure to use reasonable care in providing warnings to workers about the products' dangers and about the proper precautions to be taken when working with or near their asbestos products; failure to test their products and conduct safety research on them; and failure to remove the products from the market. Hence, the causes of action asserted are based on negligence, strict liability, and breach

of express and implied warranties. Jurisdiction is based upon diversity of citizenship. Austin v. Unarco Industries, Inc., 705 F.2d 1, 3 (1st Cir.), cert. dismissed, -- U.S. --, 104 S. Ct. 34 (1983).

No suit was brought by any plaintiff against the government on any theory. As government employees, their exclusive remedy against the United States was under the Federal Employees' Compensation Act, 5 U.S.C §§ 8101, 8116(c), which provides no-fault compensation for work-related injury or death.

Shortly after the filing of plaintiffs' complaints, defendants sought to implead the United States as a third-party defendant. Defendants charged that the United States had breached various contractual and tort duties of care to them and to the federal employees. Judge Gignoux, who has shepherded these

consolidated actions since their inception, directed defendants to file a model third-party complaint containing all the theories they sought to press in their third-party actions. The pertinent complaint thereafter filed[2] contained nine separate counts. In response to the United States' motion, the district court dismissed all but one count of the model third-party complaint and reserved judgment on Count VI. See In re All Maine Asbestos Litigation, 581 F. Supp. 963, 980-81 (D. Me. 1984). Count VI, which seeks noncontractual

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2. Defendants actually filed two third-party complaints against the United States. The first, designated "Model Third-Party Complaint A," was filed in reference to cases where the injured worker was employed by Bath Iron Works, a private shipyard. In contrast, Model Third-Party Complaint B, the subject of this appeal, was filed in reference to cases where the injured worker was a government employee at Portsmouth Naval Shipyard.

indemnification and/or contribution,[3] is predicated upon the Federal Tort Claims Act (hereinafter FTCA), 28 U.S.C. §§ 1346(b), 2671 et seq. The FTCA provides, inter alia, that subject to certain exceptions, the government "shall be liable" in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

The district court denied the government's motion to dismiss Count VI in a supplemental opinion. In re All Maine Asbestos Litigation (PNS Cases), 589 F. Supp. 1563 (D. Me. 1984). The court held that under the analytical

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3. The defendant manufacturers do not concede that the other eight counts were properly dismissed, but this question is not before us; although the district court certified its disposition of all nine counts, we accepted for interlocutory appeal only Count VI.

approach mandated by the FTCA, the liability of the United States would be determined on the basis of the law a Maine court would apply to an analogous private shipyard employer. Applying Maine law, the court held that it was unclear whether Maine courts would recognize the "dual capacity" doctrine as a means of imposing liability on a workers' compensation-paying shipyard employer which is also a ship owner, as the United States is in this instance. While Maine law clearly prohibits any form of additional liability, including third-party liability, imposed upon employers covered by the state workers' compensation statute, the district court found that it was not clear whether this protection extended to a third-party claim for noncontractual indemnity or contribution brought against a compensation-paying private employer in

its capacity as a vessel owner. The district court was of the opinion that the only appropriate course was to certify the question to the Supreme Judicial Court of Maine, and that it would do so after a trial on the merits.[4]

At the United States' request, the question whether Count VI, too, should have been dismissed was certified and accepted for interlocutory appeal.[5] This

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4. The Maine Supreme Judicial Court has indicated that before answering a certified question, it would prefer to have a record showing that the certified question will be dispositive of the case. See Maine R. Civ. P. 76B(a); White v. Edgar, 320 A.2d 668,677 (Me. 1974); In re Richards, 223 A.2d 827, 833 (Me. 1966); see also Gagne v. Carl Bauer Schraubenfabrick, 595 F. Supp. 1081, 1088 (D. Me. 1984).

5. For some reason the parties failed to comply with the responsibilities imposed upon them by Fed. R. App. P. 10 and 11, and Local App. R. 8(b), viz., that they assemble and file the record in this case. The only papers this court received were a copy of Model Third-Party Complaint B, the United States' answer, and a copy of

(Footnote 5 Continues on Following Page)

count contains two distinct theories of recovery. First, defendants press what may be summarized as landbased theories, i.e., alleged negligence of the government in its capacities as the plaintiffs' employer and as the owner of the shipyard. Second, defendants seek contribution or indemnity from the United States because of its alleged status as owner of the vessels on which the underlying plaintiffs worked at the time of their asbestos exposure. The gravamen of the claim is that, as the owner of the ships being constructed or repaired, the United States failed to exercise the appropriate level of care regarding the

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(Footnote 5 Continued from Previous Page) the Master Docket for In re All Maine Asbestos Litigation. The court, on its own initiative, had to examine the papers on file in the district court. The parties were not released from their responsibilities to assemble the record merely because this was an interlocutory appeal.

conditions under which the workers performed their duties, a dereliction of duty which allegedly was the proximate cause of the workers' injuries. Defendants base their second claim on the Longshore[6] and Harbor Workers' Compensation Act, 33 U.S.C § 905(b). Whether either theory of liability contained in Count VI should have been dismissed is the question before us at this time, and we discuss their merits separately.

I. LAND-BASED THEORIES OF LIABILITY

A

The defendants allege that governmental third-party liability exists because the underlying plaintiffs' land-

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6. Congress has modified the name of the Act by changing "Longshoremen" to "Longshore." See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d).

based exposure to asbestos was a result of the government's negligence in its capacity as employer and as shipyard owner. The government replies that the "only ruling timely brought to this Court . . . [is] the government's appeal of the district court's adverse ruling as to the vessel owner claim." The government argues that the denial of appellee's petition to bring all other issues before this court on interlocutory appeal "precludes consideration of the manufacturers' claims other than that against the government qua vessel owner."

The government is correct that this court allowed interlocutory appeal on only the denial of the dismissal of, or alternatively, of summary judgment on, Count VI. We do not, however, read Count VI as narrowly as the government. In Count VI, defendants allege claims against the government not only in its

capacity as a vessel owner but also "as the owner of the shipyards . . . the designer of the specifications . . ., and as the general supervisor of the work performed . . . ." Model Third-Party Complaint B, ¶ 39. Although the district court stated that "Count VI . . . does not . . . assert a claim against the United States in its capacity as an employer, but in its capacity as a vessel owner," we think that Count VI on its face encompasses employer and shipyard owner theories.

Regardless of the fact that the district court did not read Count VI as stating a claim against the government qua employer, it discussed and applied the relevant situs law that governs land-based employers as an analytical step in its disposition of the vessel owner claim. We do not think, therefore, that the district court's failure to make a

separate ruling on the land-based theories of liability bars our review of them. No prejudice will result to either party and we have all the facts necessary for such a review.

B

As the district court noted, "[i]t is undisputed that the PNS employees and deceased employees in these cases were covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 et seq., and that they are barred from suing the United States as their employer by FECA's exclusive liability provision, 33 U.S.C. § 8116(c)." Interpreting these provisions recently, the Supreme Court held that "FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States." Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 199 (1983).

The Court added, however, that other substantive law affirmatively granting the right to proceed against the government must be identified in order to maintain such a third-party action. See id. at 197 n.8, 199; accord Prather v. Upjohn Co., 585 F. Supp. 112, 114 (N.D. Fla. 1984). Consequently, we find that the district court was correct in turning initially to the substantive provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, on which jurisdiction for Count VI is predicated, to determine whether defendants could maintain their action.

C

The Federal Tort Claims Act is a limited waiver of sovereign immunity that subjects the United States to tort liability within certain parameters. The FTCA provides in pertinent part:

> The United States shall be liable, respecting the

> provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. § 2674. The waiver extends to third-party claims against the government. United States v. Yellow Cab Co., 340 U.S. 543 (1951). And it extends to third-party claims against the government for losses incurred by third-parties as the result of injuries to federal employees covered by FECA where other applicable substantive law grants a right of recovery. Lockheed, 460 U.S. at 198.

Section 2674 is amplified by a sister provision stating that, subject to certain exceptions, federal district courts are granted subject matter jurisdiction over claims to redress injury caused by any employee of the

government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C § 1346(b) (emphasis added). To identify the applicable rule of substantive law, the FTCA directs us to determine the substantive law that would apply to "a private individual under like circumstances" in the jurisdiction where the injury occurred. We therefore look to whether a private person in like circumstances would be liable under the law of Maine, the situs state. United States v. Muniz, 374 U.S. 150, 153 (1963); Brooks v. A. R. & S. Enterprises, Inc., 622 F.2d 8, 10 (1st Cir. 1980).

All parties agree with the district court that "a private individual under like circumstances" is a compensation-

paying private shipyard employer in Maine. They differ, however, on what kind of compensation system is to be ascribed to the analogous private employer for purposes of the FTCA analysis. The defendant asbestos manufacturers contend that the analogous private employer is a private shipyard employer with a FECA-like workers' compensation system. The United States and the district court posit that an analogous private shipyard employer would be covered under the Maine Workers' Compensation Act (the Maine Act or MWCA), 39 Me. Rev. Stat. Ann. § 1 et seq. (1978 & Supp. 1984-85).

In the companion case of Drake v. Raymark Industries, Inc., Nos. 84-2033, 84-2034, slip op. (1st Cir. August __, 1985), we determined that a compensation-paying private shipyard employer in Maine, Bath Iron Works, was concurrently

covered by both the Maine Act and Longshore and Harborworkers' Compensation Act. We held that both Acts barred contribution and noncontractual indemnity actions, such as defendants seek to maintain here, against a compensation-paying employer. The Drake ruling governs the question here and requires that defendants' third-party claims against the government in its capacity as employer be dismissed. See id. at 27-34.

Defendants argue, however, that § 4 of the Maine Act bars none of their claims because that statute by its terms cannot apply to the United States. For the same reason, neither could the Longshore Act apply to the government. This latter argument, however, was not made by defendants undoubtedly because it would have negated their vessel owner negligence claim predicated on the application of the Longshore Act to the

United States despite the government's exclusion from its coverage. Nevertheless, they contend that considering the United States as "a private individual under like circumstances" as the FTCA mandates, the proper analogy is a private employer covered by FECA and not by the Maine Act. Under such an approach, the type and provisions of the applicable workers' compensation system is one of the "circumstances" that must be factored into the analysis. The appropriate analogy, therefore, is a private shipyard employer covered by a workers' compensation scheme like FECA, with an exclusivity provision worded and interpreted like that of FECA. Because Lockheed held that FECA's exclusivity provision did not bar third-party actions such as this, the defendants claim that Count VI's land-based theories of

liability may proceed. In their view, the Maine Act's exclusivity provision is simply inapplicable and irrelevant.

We find this reasoning unpersuasive. A private shipyard employer in Maine, as is Bath Iron Works, would be covered by the MWCA as well as the LHWCA, and the FTCA defines the United States' liability as that of "a private individual in like circumstances." 28 U.S.C § 2674. As one court has noted,

> unless the phrase "under like circumstances" is read to nullify the phrase "private individual" and not to modify it, [the state compensation scheme] must apply to [third-party plaintiffs'] claims. It is of course possible to argue that FECA is one of the "circumstances" which define the liability of the United States as a shipyard employer; FECA does not, however, apply to a "private individual." Applying FECA would therefore be facially inconsistent with the language of the FTCA.

Colombo v. Johns-Manville Corp., 601 F. Supp. 1119, 1128 (E.D. Pa. 1984). Accord Roelofs v. United States, 501 F.2d 87, 92-93 (5th Cir. 1974) (state workers' compensation system, including defenses available to covered employers, is the law applied to the United States under FTCA even though the government was not in actuality covered under the state compensation law); see also Stewart v. United States, 716 F.2d 755, 765 (10th Cir. 1982) (same), cert. denied, 53 U.S.L.W. 3365 (1984). We hold that these land-based third-party claims are barred by § 4 of the Maine Workers' Compensation Act and 33 U.S.C. § 905(a).

II. THIRD-PARTY LIABILITY OF THE UNITED STATES AS VESSEL OWNER UNDER § 905(b)

In Count VI of Model Third-Party Complaint B, defendant manufacturers

also press a claim against the United States for shipowner negligence, purportedly based on the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. § 905(b). They cite the FTCA as again providing the necessary waiver of sovereign immunity.

Although federal workers are expressly excluded from LHWCA coverage, see 3 U.S.C § 903(a)(2), defendants contend that by employing the FTCA analogical method properly, this exclusion is rendered irrelevant. Defendants reason that "a private person under like circumstances" to the United States, 28 U.S.C. § 2674, is a vessel owner. Applying the law of the place as required by the FTCA, 2B U.S.C. §§ 1346(b), 2674, means whatever law, and choice of law rules, the locality would apply in a given case, Richards v. United States, 369 U.S. 1, 11-13 (1962); Hess

v. United States, 361 U.S. 314, 318 n.7 (1960). Defendants claim that federal substantive law, and specifically, the Longshore Act, would have to be utilized by Maine courts to determine the viability of the shipowner negligence claim. See Jones & Laughlin Steel Corp. v. Pfeiffer, 462 U.S. 523 (1983); Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 165 n.13 (negligence actions that are brought against the shipowner pursuant to § 905(b) are governed by federal maritime principles).

We doubt whether we can ignore an express congressional exclusion of federal workers from coverage under the LHWCA, and employ an FTCA analogy by which coverage can be analogically presumed so as to render the United States vulnerable to a shipowner negligence suit. It is well-established that the terms of the waiver as set forth

expressly and specifically by Congress define and delimit the boundaries of the court's subject matter jurisdiction to entertain suits brought against the government. See United States v. Orleans, 425 U.S. 807, 813-14 (1976); Dalehite v. United States, 346 U.S. 15, 30-31 (1953). Where a provision of the FTCA excludes what would otherwise be a potential cause of action, no action against the government is permitted. See, e.g., United States v. S.A. Empresa de Viacao (Varig Airlines), __ U.S.__, 104 S. Ct. 2755, 2762 (1984). Moreover, where other federal policies, express or implied, preclude what would otherwise be a potential cause of action, no action against the government may stand. See Johansen v. United States, 343 U.S. 427, 436-440 (1952); see also Laird v. Nelms,

406 U.S. 797, 802-03 (1972).[7] But we

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7. Unfortunately, Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), does not dispose of this FTCA thicket. In Lockheed the Court was confronted with determining whether the exclusivity provision of FECA, 5 U.S.C. § 8116(c), barred a properly-brought FTCA action that the underlying substantive law otherwise would have permitted. Here, we are concerned with more fundamental questions, such as whether the underlying substantive law authorizes defendants' vessel owner negligence action, and additionally, whether we are required to deem an express exclusion of the United States from coverage under the LHWCA overridden by the FTCA.

It seems likely that the express exclusion of federal employees raises a bar to the third-party shipowner action sought here, similar to that recognized in Stencel Aero Engineering Corp. v. United States, 431 U.S. 66 (1977) (Feres doctrine will not be overridden for third parties). For us to permit a vessel owner suit against the government in these circumstances would likely be "to judicially admit at the back door that which has been legislatively turned away at the front door." Stencel Aero Engineering, 431 U.S. at 673 (quoting Laird v. Nelms, 343 U.S. 427; In re Agent Orange Product Liability Litigation, 506 F. Supp. 762, 772 (E.D.N.Y. 1980)). Because the substantive law question is dispositive, and rests on well-

(Footnote 7 Continues on Following Page)

shall bracket these FTCA-based concerns and assume for the purposes of our analysis that defendants seek to maintain a third-party contribution and indemnity action against a private shipyard which owns the ships on which the plaintiffs worked with and proximate to asbestos products.

So stated, this question is also governed by our opinion in Drake v. Raymark Industries. In Drake we held that defendant manufacturers' third-party claim against a private shipyard as owner pro hac vice would not lie under § 905(b) because that section countenances only maritime torts. Drake v. Raymark Industries, Inc., slip op. at 11. Since to qualify as a maritime tort the wrong

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(Footnote 7 Continued from Previous Page) established legal principles, we do not determine the impact of the LHWCA exclusion of federal employees on defendants' third-party action.

must have borne some relationship to "traditional maritime activity," Executive Jet Aviation v. Cleveland, 409 U.S. 249, 261 (1972), and the universal ruling of all circuits to have considered this type of wrong is that it does not bear such a relationship, see Drake, slip op. at 18-19;[8] no § 905(b) action could have been brought by plaintiffs against the owners of the ships on which they were doing construction or repair work. It follows that defendants have no contribution action under the section,

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8. See also Oman v. Johns-Manville Corp., Nos. 82-1821, 82-2042, slip op. (4th Cir. June 6, 1985) (en banc overruling of White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981)); Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984); Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984); Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1187-90 (5th Cir. 1984); Austin v. Unarco Industries, 705 F.2d 1; cf. Keene Corp. v. United States, 700 F.2d 836, 843-45 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1984).

either, since the only duties alleged to have been owed were owed to the employees, not the defendants. Accordingly, we rule that defendants' contribution and indemnity action against the third-party defendant based upon § 905(b) must be dismissed for failure to state a claim on which relief can be granted.

The district court did not analyze the defendants' vessel owner contribution action as we have.[9] It did hold that federal substantive law did not provide defendants with a vessel owner action against the government, a result that

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9. Neither, to our knowledge, has any other court analyzed the availability of a third-party contribution action under § 905(b) in this manner. See, e.g., In re All [Hawaii] Asbestos Cases, No. 790382, slip op. at 2-3 (D. Hawaii Nov. 23, 1984) (on motion for reconsideration); Colombo v. Johns-Manville Corp., 601 F. Supp. 1119, 1132-39 (E.D. Pa. 1984); In re General Dynamics Asbestos Cases, 602 F. Supp. 497 (D. Conn. 1984).

accords with our own. The district court went further, however, and held that the action would lie, if at all, on the basis of a Maine recognition of the dual capacity doctrine. The court then noted that it was unclear whether Maine recognizes the dual capacity doctrine, and within that doctrine, whether vessel owner status would be considered distinct enough from the employer capacity to eliminate the immunity from certain suits that employers enjoy under Maine law. Accordingly, the district court ruled that the question would be certified to the Maine Supreme Judicial Court following a trial on the merits. We disagree.

As we explained in Drake, the negligence action against a vessel owner from which defendants seek to derive their contribution action was created by Congress as a part of the 1972 LHWCA

Amendments. This negligence action was designed to replace the former action for unseaworthiness, a strict liability action. See H. R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4701-05. Maine does not provide a specific cause of action against vessel owners; it would lie, if at all, as an extension of the basic negligence action, and only outside of admiralty jurisdiction, which is exclusively federal.

As we noted in Austin v. Unarco, where we decided that admiralty jurisdiction would not lie for a ship construction and repair worker's claims of asbestos-engendered injuries:

> [T]he risk encountered by plaintiff's decedent is not a risk arising from the loading or operation of a vessel, against which those on the vessel are typically protected by the vessel owner. It is, rather, the same risk as that encountered by a number of

> workers on a shoreside construction project.
>
> Whatever anomalous results may follow from distinguishing between harbor workers according to the maritime nature of the hazards they encounter are at least offset, if not outweighed, by the anomalous results of treating construction workers injured by asbestos poisoning differently depending on whether they were installing asbestos in a ship or in an office building overlooking the harbor. The state has an interest in providing uniform treatment to these two like workers.

705 F.2d at 13 (emphasis added).

Defendants have not cited us any authority that suggests that the Maine Supreme Judicial Court would likely recognize the dual capacity doctrine. Indeed, the language employed in its cases suggests the contrary. For instance, in Roberts v. American Chain & Cable Co., 259 A.2d 43 (Me. 1969), the Maine Court stated:

> Our act . . . is so general in terminology as to generate the belief that the Legislature may have intended an all-embracing immunity in favor of the employer cutting across any equitable considerations which our courts in the application of equitable principles might otherwise apply.

259 A.2d at 46 (emphasis added); see also McKellar v. Clark Equipment Co., 472A. 2d 411, 416 (Me. 1984) (following Roberts) ("The employer's immunity, as defined in Roberts, extends to all noncontractual rights of contribution and indemnity" (citations omitted)). Were a suit against a vessel owner to be recognized, it would likely result from the creation of a separate liability for employers for the condition of their premises. But, as Professor Larson has noted, the state courts have "held with virtual unanimity" that workers' compensation-covered employers cannot be sued by their

employees on premises liability theories. 2A Larson, The Law of Workmen's Compensation § 72.82, at 14-234 (1983). The obvious reason for these holdings is that "[i]f every action and function connected with maintaining the premises could ground a separate tort suit, the concept of exclusiveness of remedy would be reduced to a shambles." Id. at 14238. Accordingly, defendants' claims against the government in its capacity as vessel owner--a premises liability theory--are also barred. See Columbo v. Johns-Manville, 601 F. Supp. at 1131 ("The obligation of the United States to provide a safe workplace and to warn employees about the hazards of certain materials arises solely out of the employment relationship. There is, in effect, no alternative capacity in which to sue an employer on these theories"). Id. at 14-238. As the government points

out, there are no reported cases even hinting that Maine might deviate from the universal view.

To summarize, defendants have not shown that Maine or any other state has recognized and allowed a suit against an employer qua vessel owner under the rubric of dual capacity. Because it has its roots in admiralty, which is within exclusively federal jurisdiction, we find it difficult to believe that such a suit would be recognized in Maine. We think, therefore, that under these circumstances certification is not necessary on either the dual capacity doctrine or on the availability of a suit against an employer qua vessel owner.[10]

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10. Appellee Pittsburg-Corning argues that the United States may be held liable under a pro tanto theory of recovery. This contention runs as follows. Under Maine law, an employer who pays workers' compensation benefits may assert a lien on an employee's recovery from a
(Footnote 10 Continues on Following Page)

Affirmed in part and vacated in part.

(Footnote 10 Continued from Previous Page)
third-party. Therefore, if the negligence of the United States qua employer contributes to the injuries of any of the plaintiffs, the United States should be denied its lien to the extent of its proportionate (pro tanto) share of the damages, and any judgment against the defendants should be reduced by an amount equal to the portion of the lien denied.

As the government points out, however, the defendants did not specifically allege entitlement to pro tanto relief in their model complaint against the government. This omission contrasts sharply with the same parties' action in the BIW Cases where they specifically alleged in Count I a right to pro tanto relief. See BIW Cases, 589 F. Supp. at 1566. Moreover, we discovered nothing in our review of the record indicating that defendants ever presented this theory to the district court and they make no specific claim that the theory was advanced below. Accordingly, the question of pro tanto relief is not properly before us. Even if it were, the Maine Supreme Judicial Court has very recently rejected defendants' position. See Diamond International Corp. v. Sullivan & Merit, Inc., No. Ken-84-358, slip op. (Me. June 6, 1985).

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

In re ALL MAINE ASBESTOS LITIGATION:

AMENDED ORDER OF THE COURT

(See Fed. R. App. P. 5(a))

In accordance with the opinion of this Court in the above-captioned cases dated February 23, 1984, see In re All Maine Asbestos Litigation, 581 F. Supp. 963 (D. Me. 1984), as supplemented by the opinion of this Court dated July 6, 1984, see In re All Maine Asbestos Litigation (PNS Cases) (D. Me. July 6, 1984), it is ORDERED as follows:

(1) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V,

VII, VIII and IX of Model Third-Party Complaint A is GRANTED;

(2) That the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint A is DENIED;

(3) That the motion of the United States to dismiss, or for summary judgment on, Counts I, II, III, IV, V, VII, VIII and IX of Model Third-Party Complaint B is GRANTED;

(4) That the motion of the United States to dismiss, or for summary judgment on, Count VI of Model Third-Party Complaint B is DENIED.

In accordance with 28 U.S.C. § 1292(b), the Court hereby CERTIFIES that it is of the opinion that the above order involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Dated at Portland, Maine, this 23d day of July 1984.

/s/Edward T. Gignoux

United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

In re ALL MAINE ASBESTOS LITIGATION :
(PNS Cases) :

SUPPLEMENTAL OPINION AND ORDER OF THE COURT

GIGNOUX, Senior District Judge

In its opinion and order dated February 23, 1984, the Court granted the motion of the United States to dismiss, or for summary judgment on, all but one of the counts in the third-party complaint for contribution and/or indemnification filed by defendants against the United States (Model Third-Party Complaint B) in each of the asbestos-related actions filed in this Court by present and former employees, and the representatives of deceased employees, at Portsmouth Naval Shipyard (PNS). See In re All Maine Asbestos Litigation, 581 F. Supp. 963, 980-81 (D. Me. 1984). In that opinion, the Court

reserved decision on so much of the United States' motion as sought dismissal of Count VI of Third-Party Complaint B, a count which seeks noncontractual indemnification and/or contribution from the United States based upon breach of duties allegedly owed to plaintiffs by the United States in its capacity as the owner of naval vessels at PNS. The Court deferred ruling on this aspect of the United States' motion until disposition of a then pending motion for reconsideration of its opinion in Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313 (D. Me. 1981), a decision upon which the United States had relied heavily in urging dismissal of Count VI of Third-Party Complaint B. In Austin, the Court had held that section 905(a) of the Longshoremen's Harbor Workers' Compensation (LHWCA), 33 U.S.C. § 905(a), barred the third-party claims asserted

against Bath Iron Works (BIW) by the defendant asbestos manufacturers. Id. at 315-16. On March 9, 1984, being persuaded that Austin was inconsistent with the subsequent decision of the United States Supreme Court in Lockheed Aircraft Corp. v. United States, ___ U.S. ___, 103 S. Ct. 1033, 51 U.S.L.W. 4206 (U.S. Feb. 23, 1983), the Court vacated its Austin decision. See In re All Maine Asbestos Litigation (BIW Cases), ____ F. Supp. ____, ____ (D. Me. July 5, 1984) (App. A).

The issues presented by the motion to dismiss Count VI of Third-Party Complaint B have now been fully briefed and argued. The relevant factual background and procedural posture are set out in this Court's previous opinion. See In re All Maine Asbestos Litigation, 581 F. Supp. 963. For the reasons to be stated, the Court has concluded that the motion must be denied.

I.

It is undisputed that the PNS employees and deceased employees in these cases were covered by the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8101 et seq., and that they are barred from suing the United States as their employer by FECA's exclusive liability provision, 33 U.S.C. § 8116(c). In Lockheed, the Supreme Court held that "FECA's exclusive liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States." ____ U.S. at ____, 103 S. Ct. at ____, 51 U.S.L.W. at 4208. Contrary to defendants' contention, however, Lockheed did not affirmatively confer upon third parties an indemnity or contribution remedy against the United States"[1] Rather, the Court made clear

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1. Although in Lockheed the Supreme Court was concerned only with a
(Footnote 1 Continues on Following Page)

that recourse must be had to the "governing substantive law." Id.; see Prather v. The Upjohn Co., MCA No. 81-0211, slip op. at 3-4 (N.D. Fla. Feb. 15, 1984).

In these cases, jurisdiction over Count VI of Third-Party Complaint B is predicated on the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. Determination of whether under the governing substantive law defendants may sue the United States for indemnity or contribution in its capacity as a vessel owner at PNS therefore must begin with analysis of the provisions of the FTCA.

(Footnote 1 Continued from Previous Page) third-party indemnity claim, it is clear that the holding is equally applicable to a third-party contribution claim. See Johns-Manville Sales Corp. v. United States, No. C-81-4561, slip op. at 10 (N.D. Cal. Jan. 6, 1984), reprinted in Asbestos Litigation Reporter 7,721, 7,724 (Jan. 20, 1984); see also Prather v. The Upjohn Co., MCA No. 81-0211, slip op. at 3 (N.D. Fla. Feb. 15, 1984).

II.

The FTCA subjects the United States to liability only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); see also 28 U.S.C. § 2674.[2] The liability of the United States depends upon whether a private person in like circumstances would be liable under state law. United States v. Muniz, 374 U.S. 150, 153 (1963); Brooks v. A. R. & S. Enterprises, Inc., 622 F.2d 8, 10 (1st Cir. 1980); Lambertson v. United States, 528 F.2d 441, 444 (2d

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2. Section 2674 provides in relevant part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.

Cir.), cert. denied, 426 U.S. 921 (1976). Thus, in determining whether the United States is subject to liability under the FTCA for contribution or indemnity on a theory of vessel-owner negligence, this Court must look to the law that a Maine court would apply in analogous circumstances.

III.

The Court agrees with the United States that its status at PNS is analogous to that of a compensation-paying private shipyard employer in Maine. Such an employer would be covered by the Maine Workers" Compensation Act (the Maine Act), 39 Me. Rev. Stat. Ann. § 1 et seq. (1978 & Supp. 1983-84). Section 4 of the Maine Act, 39 Me. Rev. Stat. Ann. § 4 (Supp. 1983-84), as interpreted by the Maine Court, provides a covered employer with immunity from third-party claims for noncontractual

contribution or indemnity arising from work-related injuries to its employees. McKellar v. Clark Equipment Co., 472 A.2d 411, 416 (Me. 1984); Roberts v. American Chain & Cable Co., 259 A.2d 43, 51 (Me. 1969). This Court has recently held that BIW, a compensation-paying private shipyard employer in Maine, is immunized by Section 4 from such third-party suits brought against it as an employer. In re All Maine Asbestos Litigation (BIW Cases), ____ F. Supp. ____ (D. Me. July 5, 1984). Since the FTCA subjects the United States only to analogous private liability, the United States enjoys the immunity provided by Section 4 of the Maine Act to a compensation-paying private shipyard employer from third-party suits for noncontractual contribution or indemnity brought against it in its capacity as an employer. See Lambertson v. United States, 528 F.2d at

444 ("if the state would look to a state . . . statute in determining the liability of a private person for the tort in question, the same statute will be applied in measuring the conduct of the government."); Prather v. The Upjohn Co., slip op. at 4-5; Giannuzzi v. Doninger Metal Products, Civ. No. 82-1578 (W.D. Pa. May 16, 1984); see also Hess v. United States, 361 U.S. 315, 319 (1960).

Count VI of Third-Party Complaint B does not, however, assert a claim against the United States in its capacity as an employer, but in its capacity as a vessel owner. The authorities are unclear as to whether the immunity granted an employer by a workers' compensation act protects the employer from liability for employee suits brought against it in some other capacity. See generally 2A A. Larson, The Law of Workmen's Compensation §§ 72.80 - 72.84 (1983). No Maine

authority known to this Court indicates whether the Maine courts would recognize this so-called "dual capacity" doctrine. Consequently, it cannot be known whether section 4 of the Maine Act protects a compensation-paying employer-vessel owner from a third-party suit arising from an injury to an employee and brought against the employer in its capacity as a vessel owner.

IV.

The United States argues that even if section 4 of the Maine Act does not immunize it from third-party claims brought against it as a vessel owner, maritime law does not permit the third-party claims here asserted. It makes a rather elegant argument in support of this position, dealing separately with the indemnity and contribution claims.

The United States argues, first, that the claims for noncontractual indemnity

will not lie because the plaintiffs in the primary actions seek recovery from defendants for only active fault, while maritime law will award indemnity only to a party passively at fault. See White v. Johns-Manville, 662 F.2d 243, 249 (4th Cir. 1981); Glover v. Johns-Manville, 662 F.2d 225, 229 (4th Cir. 1981).

The United States contends, second, that the claims for contribution cannot be maintained because joint tortfeasor liability is required to support a contribution claim in a noncollision admiralty case. See Cooper Stevedoring Co. v. Kopke, Inc., 417 U.S. 106, 115 (1974); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 44 (3d Cir. 1975), cert. denied, 423 U.S. 1054 (1976). Cf. Weyerhauser Steamship Co. v. United States, 372 U.S. 597 (1963). It alleges that there can be no joint tortfeasor liability between it and

defendants because plaintiffs are barred by section 8116(c) of FECA from bringing suit against the government in any capacity, including its status as a vessel owner. See Patterson v. United States, 359 U.S. 495, 496 (1959); Johansen v. United States, 343 U.S. 427 (1952); Johnson v. United States, 402 F.2d 778, 779 (5th Cir.), cert. denied, 394 U.S. 930 (1969).

The Court cannot accept the United States' argument. Each aspect of the argument contains a fatal flaw. First, the United States has not shown that the claims asserted by plaintiffs in each of these individual actions are limited to allegations of active fault. The argument that the indemnity claims are barred by the maritime active/passive doctrine is dependent upon such a showing.

Second, the Johansen/Patterson line of cases is inapposite to the third-party contribution claims asserted by the defendant manufacturers in these cases. The relevant inquiry under the FTCA must be as to whether a private shipyard employer in Maine would be subject to liability to its employees for negligence in its capacity as a vessel owner. Such a private shipyard would not be protected by the Johansen/Patterson doctrine because the shipyard would not be covered by the FECA. Indeed, by reason of section 905(b) of the LHWCA, a private shipyard employer-vessel owner would be subject to liability to its employees for negligence in its capacity as a vessel owner. Jones & Laughlin Steel Corp. v. Pfeiffer, ___ U.S. ___, 103 S. Ct. 2541, 51 U.S.L.W. 4795 (U.S. June 15, 1983). The argument of the United States that defendants' third-party claims for

contribution are barred by maritime law because there can be no joint tortfeasor liability between it and defendants therefore fails.

V.

The viability of defendants' third-party claims against the United States in its capacity as a vessel owner thus turns on whether the Maine courts would apply the dual capacity doctrine in these circumstances and hold that section 4 of the Maine Act does not protect a compensation-paying private employer from a third-party claim for noncontractual indemnity or contribution brought against it in its capacity as a vessel owner. Since the Supreme Judicial Court of Maine has not spoken to this question, and courts in other jurisdictions have not been consistent in applying the dual capacity doctrine, see 2A A. Larson, The Law of Workmen's Compensation §§ 72.80 -

72.84, the Court deems it appropriate at this time to deny the United States' motion to dismiss Count VI, and, upon its own motion or upon request of a party at the close of trial, to consider certifying the question to the Supreme Judicial Court of Maine pursuant to Me. R. Civ. P. 76B. The Maine Court has made clear that such a certification should be made only on a complete record. See Hiram Ricker & Sons v. Students International Meditation Society, 342 A.2d 262 (Me. 1975); White v. Edgar, 320 A.2d 668 (Me. 1974); In re Richards, 223 A.2d 827 (Me. 1966).

VI.

In accordance with the foregoing, IT IS ORDERED that the United States' motion to dismiss or for summary judgment on Count VI of Model Third-Party Complaint B is DENIED.

Dated at Portland, Maine, this 6th day of July 1984.

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United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 84-2033

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third-Party Plaintiffs,
Appellants.

No. 84-2034

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third-Party Plaintiffs,
Appellees.

BATH IRON WORKS CORPORATION,
Third-Party Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. Edward T. Gignoux, Senior U.S. District Judge]

Before
Campbell, Chief Judge,
Bownes and Torruella, Circuit Judges.

Mark G. Furey, with whom Thomas R. McNaboe, Thompson, McNaboe & Ashley, Bernstein, Shur, Sawyer & Nelson, Hunt, Thompson & Bowie, Verrill & Dana and Skelton, Taintor, Abbott & Orestis were on brief for Raymark Industries, Inc. Robert F. Hanson with whom James D. Poliquin and Norman & Hanson were on brief for Bath Iron Works Corporation.

August 27, 1985

BOWNES, Circuit Judge. This is an appeal from a summary judgment granted third-party defendant-appellee Bath Iron Works Corporation (BIW or Shipyard) on claims against it for contribution or indemnity by defendants and third-party plaintiffs-appellants Raymark Industries, Inc. and other manufacturers and distributors of asbestos products.

I. BACKGROUND

This is one of approximately fifty cases brought in the District Court of Maine by present and former employees of BIW, or the representatives of their estates, against a large number of manufacturers and suppliers of asbestos products. BIW is in the shipbuilding and ship repair business. The complaints in the primary actions seek compensatory and punitive damages for injuries the employees of BIW allegedly sustained from

exposure to appellants' products during the course of their employment at the Shipyard.

With the approval of the district court, the defendants-appellants filed a Model Third-Party Complaint against BIW in each of the actions against them. The case at bar tests the soundness of the district court's ruling on motion for summary judgment that none of the six counts of the Model Third-Party complaint could be maintained. We restate the allegations in the complaint seriatim.

Count I alleges that BIW knew or should have known that the material it purchased for use in the construction and/or repair of ships included asbestos and products containing asbestos, and that its employees would come into contact with such materials; that BIW knew or should have known that working with asbestos and products containing

asbestos posed unreasonable health dangers unless adequate precautionary measures were taken; that BIW wantonly, recklessly and negligently failed to exercise due care vis-a-vis its employees in ten specific ways; that any damages to plaintiffs were caused by BIW; that any judgment against the defendants should be reduced by the amount of BIW's workers' compensation lien under the Longshoremen and Harbor Workers Compensation Act (LHWCA) or, in the alternative, the defendants are entitled to a judgment against BIW in the amount of such liens. Defendants also seek declaratory relief that BIW be ordered to pay directly to them any future workers' compensation benefits to which the plaintiffs became entitled.

Count II seeks contribution or indemnity for any punitive damage judgments for the plaintiffs.

Count III alleges that the construction of and/or repair of ships involving asbestos and products containing asbestos were inherently dangerous activities; that defendants had no control over the products sold once they were in the possession of BIW; that BIW owed defendants a duty, independent of any duty to its employees, not to use asbestos and products containing asbestos in such a willful, wanton, reckless or negligent manner as to make them unreasonably hazardous to BIW employees or other persons; that defendants' products were not dangerous to BIW employees if used with due care; that defendants are entitled to be indemnified by BIW to the full extent of any judgments against them or, in the alternative, to the extent of BIW's worker's compensation liens.

Count IV alleges a claim for contribution for any damages for consequential and punitive damages recovered by plaintiffs against defendants, including loss of consortium.

Count V alleges that BIW had a duty to provide medical examinations, diagnosis, and treatment for the illness of its employees; that BIW's medical personnel wantonly, recklessly and negligently failed to perform their duties; that such failure caused or aggravated the asbestos-related diseases of the employees; that defendants are entitled to contribution and indemnification by BIW for any judgments against them or, in the alternative, to indemnification to the extent of BIW's workers' compensation lien.

Count VI alleges that BIW was the owner or owner pro hac vice of the vessels upon which its employees worked

within the meaning of 33 U.S.C. § 902(21); that BIW acted willfully, wantonly, recklessly and negligently as owner or owner pro hac vice; that BIW's conduct was the proximate cause of the damages claimed by plaintiffs; that under 33 U.S.C. § 905(b), BIW is liable to plaintiffs for all damages claimed in their complaints against defendants.

With one exception, all of the claims for contribution and/or indemnity are based on alleged breaches of duty by BIW to its employees. The exception is paragraph 19 of Count III which states in pertinent part: "BIW owed defendants a duty, independent of any duty it owed its employees, not to employ" the asbestos materials so as to make them unreasonably dangerous to the employees or others. Defendants failed to state whether the alleged duty is based on tort or contract. Nor did they allege the

existence of an express or implied contract between BIW and the defendants regarding the use of asbestos material. The defendants, then, "are asking us to hold a user liable to a manufacturer for the former's negligent use of the latter's defective product." Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 723 (2d Cir. 1978) (Friendly, J.). Like the Second Circuit, "[t]his we decline to do." Id.; cf. 2A Larson, The Law of Workmen's Compensation § 76.84 at 14-746 (1985) ("But when a purchaser buys a product, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality."). The district court did not expressly rule on this claim, probably because it was not pressed below. Certainly, the defendants

have not adverted to it at all in their brief to this court. Given these circumstances, we consider this claim to have been dropped but, in any event, we rule that it must be dismissed for failure to state a cause of action upon which relief can be granted. The basis of liability for defendants' third-party action is, therefore, grounded solely on BIW's alleged breach of duties to its employees.

The district court rendered three separate opinions. On Counts I through V, which we shall refer to as the land-based or nonmaritime claims, the court granted summary judgment for BIW, excepting only those claims for pro tanto indemnification. 589 F. Supp. 1563 (D. Me. 1984). The court based its ruling on the grounds that the exclusivity provision of the Maine Workers Compensation Act (MWCA), Me. Rev. Stat.

Ann. tit. 39, § 4 (1978 and Supp. 1983-84), had been interpreted by the Maine Supreme Judicial Court to bar all noncontractual rights of contribution and indemnity. McKellar v. Clark Equipment Co., 472 A.2d 411, 416 (Me. 1984); Roberts v. American Chain & Cable Co., Inc., 259 A.2d 43, 51 (Me. 1969). In a subsequent opinion, the district court granted summary judgment for BIW on the pro tanto claims.

> Because no benefits have been paid to Forrest Drake, his widow or his dependents under the Maine Workers' Compensation Act, and BIW and its insurer have waived any workers' compensation lien under the LHWCA, there is no predicate for the pro tanto relief sought by defendants against BIW in their third-party complaints.

On Count VI the district court held "that BIW was not during the relevant periods the owner pro hac vice of vessels being constructed or repaired in its yard and that the cause of action asserted in

Count VI of R-M's third-party complaints is therefore barred by Section 905(a) of the LHWCA."

We shall review first the district court's disposition of Count VI, for contribution based on the alleged negligence of the BIW qua shipowner vis-a-vis the injured employees. We then evaluate the court's disposition of the land-based claims. Our ultimate conclusion is the same as the district court's--that none of the counts contained in the model third-party complaint can withstand a motion for summary judgment--although we reason to that conclusion via a different route.

II. THIRD-PARTY LIABILITY AS A SHIPOWNER UNDER § 905(b)

In Count VI of their Model Third-Party Complaint, defendant manufacturers press a claim against Bath Iron Works for

shipowner negligence, purportedly based on the Longshore and Harbor Workers' Compensation Act[1] (LHWCA or Longshore Act), 33 U.S.C. § 905(b). Defendants correctly claim that determinations regarding the viability of § 905(b) negligence claims are governed by federal maritime principles. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983); Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 165 n.13 (1981). Turning to the statute, the pertinent language reads as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of

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1. Congress has modified the name of the Act by changing "Longshoremen" to "Longshore." See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d).

> this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b) (emphasis added).

In the case before us, the injured employee's representative did not bring an action against BIW as shipowner pro hac vice, or against any other shipowner; she filed no § 905(b) action whatsoever. Instead, she filed strictly nonmaritime, state causes of action against the various asbestos product manufacturers and suppliers based on Maine law and grounded on diversity jurisdiction. Her claims involved strict liability, breach of warranty and negligence. Despite the nonmaritime nature of these primary claims, defendants seek to assert § 905(b) as a basis for indemnity or contribution[2] from BIW, which by its

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2. Defendants allege no contractual
(Footnote 2 Continued on Next Page

terms confers authority to bring a shipowner negligence action upon the injured employee or his/her representative, and the employer as statutory assignee. See 33 U.S.C. § 933(b): Rodriquez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981).

Although contribution has a long and venerable history in admiralty and maritime affairs, see Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974); see generally Staring, Contribution and

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(Footnote 2 Continued from Previous Page) basis for indemnity but only noncontractual indemnity. As the noncontractual indemnity here appears to be based upon tort theory, see Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718 (2d Cir. 1978), and is in effect only a more extreme form of contribution, see, id., we shall refer henceforth only to defendants' right to contribution. Clearly, if defendants have no right to partial contribution based on applicable tort principles, they have no right to indemnification of the whole of their damages based on those same tort principles.

Division of Damages in Admiralty Cases, 45 Calif. L. Rev. 304 (1957), we doubt whether a contribution action premised solely upon § 905(b) can proceed without having as its predicate a § 905(b) primary action properly brought by one of the parties authorized by the statute. Especially in a situation such as this, where the primary action is based on distinctly nonmaritime rights and duties--duties owed by any manufacturer of a product later determined to be defective and which bear no significant relationship to maritime commerce--it seems that defendants cannot use § 905(b) as a source of a right to contribution from a shipowner or owner pro hac vice. Our study of the decisional law failed to uncover any cases where § 905(b) was allowed to be asserted as the basis for liability in a third-party action where it was not sued upon in a primary action.

We note, however, that the parties did not raise or brief this question. We therefore shall bracket this question and assume arguendo that defendants are not barred from bringing a contribution action based on the plaintiff's omission of a § 905(b) claim in her action.

Appellee BIW contends that defendants' § 905(b) action cannot be maintained because the injury allegedly caused by BIW's dereliction of duty as a shipowner pro hac vice was not a maritime tort, which is a fundamental requirement for an injury to be cognizable under § 905(b). The appellants respond by arguing that an independent basis for admiralty jurisdiction need not be shown to redress an injury under the section; all that is required is satisfaction of the literal words of the statute, which does not so much as mention the words "maritime tort" or "admiralty jurisdiction."

The question before us, then, is: does § 905(b) recognize only maritime torts, i.e., torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity), or does its range encompass nonmaritime torts occurring on a vessel but where the tests for admiralty jurisdiction are not satisfied? After careful study, we think the scope of § 905(b) is limited to maritime torts. To explain our conclusion, we must examine the definition of the term "maritime tort," retrace the origin of § 905(b) in the warranty of seaworthiness, and demonstrate why the alternative conclusions about the scope of § 905(b) that have been advanced fail to accord with logic, the legislative history of the section, and the admiralty "traditions of simplicity and practicality." Kermarec v. Compagnie

Generale Transatlantique, 358 U.S. 625, 631 (1959); The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874).

A. Maritime Tort

It is elementary, almost axiomatic, that maritime torts are those which fall within the admiralty jurisdiction or satisfy the tests for the application of admiralty law. Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972), makes this point plainly: "[d]etermination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts . . . ." Id. at 253 (emphasis added); see also Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1972). The Court in Executive Jet began its analysis of the proper scope of maritime tort jurisdiction from this premise, and rejected the traditional dependence of the determination solely upon the "locality

of the wrong." Id. The Court concluded that a showing of a "relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." Id. at 261; see also Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert. dismissed, 104 S. Ct. 34 (1983). In Foremost Insurance Co. v. Richardson, 457 U.S. 668, 673 (1982), the Court held that this two-pronged situs and status test must be met in all actions sought to be governed by admiralty law.

Before Executive Jet, then, to be classified as a maritime tort the wrong had to fall within admiralty jurisdiction, which in turn required only that the wrong occur or take effect on navigable waters. Foremost Insurance, 457 U.S. at 672; Kermarec v. Compagnie

Generale, 358 U.S. at 628; Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958-59 (5th Cir. 1971). One special maritime tort action, the strict liability unseaworthiness action for stevedores and other shorebased maritime workers, however, required that additional elements besides admiralty jurisdiction be satisfied. To fasten liability without fault onto a vessel and its owners, the courts also required that the vessel be "in navigation," Waganer v. Sea-Land Service, Inc., 486 F.2d 955, 958 (5th Cir. 1983): see also Williams v. Avondale, 452 F.2d at 957; G. Gilmore & C. Black, The Law of Admiralty 441 (1975), and that the injured worker or his work group be engaged in traditional "ship's work," not some land-based specialty work. West v. United States, 361 U.S. 118, 122 (1959); United pilots Association v. Halecki, 358 U.S. 613 (1959).

The unseaworthiness action, despite its strictures, engendered a vast amount of litigation and imposed great costs upon stevedore employers and shipowners, which resulted in congressional abolition of it through the passage of § 905(b). We briefly review the genesis and history of the unseaworthiness action before turning to examine the legislative history of § 905(b) and the other 1972 Amendments to the LHWCA.

B. Unseaworthiness

Almost twenty years after the original passage of the Longshore Act, the Supreme Court was confronted with a case where a stevedore, injured when a ship's winch and boom broke, sought to sue the ship and its owner for damages. The Court held that the ship's obligation of seaworthiness, traditionally owed by ships to seamen, extended to a stevedore who was injured while aboard the vessel

and incurring seamen's hazards. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The unseaworthiness claim so authorized omitted any requirement that a shipowner's negligence or fault in causing the injury be proven. In Sieracki, the Court stated that its holding did not conflict with the Longshore Act because the LHWCA did not foreclose personal injury actions under general admiralty law except against the employer. Id. at 101. Commentators have since suggested that Sieracki was a direct result of the failure of Congress to improve the paltry compensation payable under the LHWCA and raise the incentives for safety in the shipping industry. G. Gilmore & C. Black, The Law of Admiralty at 446-48.

Ten years later, with "Sieracki-seamen" suits flourishing, the Court was again confronted with a seeming inequity.

The absolute nondelegable seaworthiness warranty imposed upon a shipowner had resulted in shipowner liability even where others, chiefly the stevedoring companies, were responsible for the workers' injuries. In Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956), the Court decided that the vessel could recover the damages for which it was liable to the injured longshoreman from the stevedore company if it had breached an express or implied warranty of workmanship performance owed the vessel. Thus was erected the final leg of the triangular damage suits which had originated with Sieracki.

Congress undertook a comprehensive reform of the Longshore Act in 1972, including as a prime element the abolition of the Sieracki-Ryan unseaworthiness action for covered workers. See Aparicio v. Swan Lake, 643

F.2d 1109 (5th Cir. 1981). In its place a complex quid pro quo was effectuated which included for covered workers higher compensation for injuries, and the option of bringing a negligence action against the vessel if the injury was caused "by the negligence of a vessel." 33 U.S.C. § 905(b); see Scindia Steam Navigation, 451 U.S. at 164-66. Strict liability actions under unseaworthiness theory and contribution or indemnity from an employer based on express or implied warranties were expressly barred. 33 U.S.C. § 905(b).

Our review of the origin and demise of longshore and harbor workers' unseaworthiness actions has led us to conclude that § 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute. The maritime tort action for negligence was a

feature of the common law of admiralty prior to Sieracki-Ryan, when one group of torts involving longshore workers, those committed on board a vessel lying in navigable waters, were excepted from the negligence standard and given strict liability treatment. Section 905(b) was enacted to bar this special treatment, and essentially returned the applicable law to its pre-Sieracki state, when negligence had to be proven to obtain damages from a vessel.

Three circuits in addition to ourselves have determined that Congress enacted § 905(b) not to create a new cause of action for any compensation system-covered worker but to abolish the judicially-authorized unseaworthiness action fashioned for longshore workers "injured on navigable waters while working on a ship . . . ." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409

(1953); see H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4702 (hereinafter H.R. Rep.). The former Fifth Circuit rendered the first decision on the question of the scope of actions that can properly be brought under § 905(b). It held that the legislative history of the 1972 Amendments to the Longshore Act "leaves little doubt that Congress did not intend § 905(b) to create a new or broader cause of action in admiralty." Parker v. South Louisiana Contractors, 537 F.2d 113, 118 (5th Cir. 1976). The Fourth Circuit followed suit shortly thereafter in Holland v. Sea-Land Service, 655 F. 2d 556 (4th Cir. 1976), and held that only maritime torts are cognizable under the provision, "torts cognizable under traditional federal admiralty jurisdiction . . . ." Id. at 558. The Holland court specifically

determined that § 905(b) "preserves [the employee's] right under prior law to recover for third-party negligence, but it does not expressly enlarge the traditional jurisdiction of admiralty over maritime torts." Id. at 559. In Christoff v. Bergeron Industries, Inc., 748 F.2d 297, the new Fifth Circuit reaffirmed the earlier ruling in Parker and stated that "§ 905(b) neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty." Id. at 298. The Eleventh Circuit found these earlier rulings persuasive authority for its holding that § 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties." Harville v. Johns-Manville Products Corp., 731 F.2d 775, 778 n.9 (11th Cir. 1984).

Having concluded that only torts that are maritime are cognizable under § 905(b), the governing principles for determining whether admiralty law will apply[3] are provided by Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, as extended by Foremost Insurance Co. v. Richardson, 457 U.S. 668. Because defendants' third-party § 905(b) action is predicated solely upon BIW's alleged dereliction of duty qua shipowner pro hac vice vis-a-vis its employee Drake, and not based upon any alleged duty running from BIW to defendants, the proper question is whether plaintiff Drake could have maintained a § 905(b) action against

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3. For a discussion of the difference between the application of admiralty law and assertion of admiralty jurisdiction, see our discussion in Austin v. Unarco Industries, Inc., 705 F.2d at 6 n.1; see also Kermarec v. Compagnie Generale, 358 U.S. 625, 628 (1959); Harville v. Johns-Manville Products Corp., 731 F.2d at 778-779.

BIW for his injuries. Accordingly, we look to whether the injury forming the basis of Drake's primary action would be cognizable in admiralty, or have admiralty law applied to it.

We consider our decision in Austin v. Unarco to have provided the channel markers for deciding that question. As we held there, to qualify as a maritime tort under Executive Jet, the wrong (1) must have occurred on navigable waters, i.e., meet a situs or locality test, and (2) must have borne a significant relationship to a maritime activity, i.e., meet a nexus test. Austin v. Unarco, 705 F.2d at 8-14. Thus, although we believe that it is necessary for the maintenance of a § 905(b) action that a party allege that a vessel's negligence was the source of the injury, such an incantation does not, as defendants contend, automatically result in the application of admiralty law.

Turning to the Executive Jet criteria, we first consider the situs requirement, i.e., that the injury occur or take effect on navigable waters. As the Eleventh Circuit noted in Harville, "when an injury is the result of a number of exposures, only some of which occurred in a maritime situs, and where the effects of the various exposures are indivisible," the question whether the situs test is met is raised. Harville, 731 F.2d at 782. That court concluded, in agreement with the Second,[4] Fourth[5] and Ninth Circuits,[6] the requirement was

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4. Keene Corp. v. United States, 700 f.2d 836 (2d cir.), cert. denied, 104 S.Ct. 195 (1983).

5. White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), vacated on other grounds sub nom. Oman v. Johns-Manville Corp., Nos. 82-1821, 82-2042, slip.op. (4th Cir. June 6, 1985) (en banc).

6. Owens-Illinois v. United States District Court, 698 F.2d 967 (9th Cir. 1983).

met "if the plaintiff has been exposed to asbestos on navigable waters regardless of whether he has also suffered exposures on land." Id. We see no reason to depart from the majority view on this question and we adopt it as our own. Thus, as in Austin v. Unarco, from our review of the record the situs requirement poses no problem to the characterization of Drake's injury as a maritime tort and "[t]he only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity." Austin v. Unarco, 705 F.2d at 8-9; see Executive Jet, 409 U.S. at 261.

Since our decision in Unarco, several other courts have considered Executive Jet's second requirement of a nexus to maritime activity in relation to asbestos injuries sustained by shipyard workers. All have reasoned to the same conclusion

albeit using somewhat different markers en route. Compare, e.g., Harville v. Johns-Manville Products Corp., 731 F.2d 775; Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1187-90 (5th Cir. 1984); Austin v. Unarco, 705 F.2d 1; Keene Corp. v. United States, 700 F.2d 836, 84345 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1984); Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983).

In Unarco, we focused on the nature of the decedent's job rather than the type of project--vessel construction or repair--on which he worked. We concluded that the plaintiff was entitled to invoke admiralty only if the decedent was "injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen." 705 F.2d at 12. We ruled that because the decedent had been

engaged in work "requiring special equipment and skills" not commonly found among the members of the ship's crew, admiralty law was not applicable to plaintiff's claims. Id. at 12-13. Other courts prior to the Eleventh Circuit's ruling in Harville focused on other criteria. The Harville Court, however, summarized and blended these various considerations, including our own, into a four-part test which harmonized with Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and Foremost Insurance Co. v. Richardson, 457 U.S. 668. The criteria to be considered under this approach are the function and roles of the parties, the type of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. This four-part approach to determining whether the tort

possesses a sufficient nexus to traditional admiralty concerns has since been adopted by the Ninth Circuit, see Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984), the Fifth Circuit, see Woessner v. Johns-Manville Sales Corp., 757 F.2d 634 (5th Cir.1985), and by the Fourth Circuit en banc in a case overturning its lone decision holding that admiralty law applied to asbestos torts suffered by shipyard workers, see Oman v. Johns-Manville Corp., Nos. 82-1821, 82-2042, slip op. (4th Cir. June 6, 1985) (en banc overruling of White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981)). The Harville approach to determining the nexus prong of the Executive Jet test also seems to us to be the best formulation yet set forth because it integrates a wide variety of

traditional concerns of admiralty law. Accordingly, we adopt this approach.[7]

With our course thus fixed, we recognize that what appeared to be a pioneer voyage is actually just another routine trip. Among all six circuits that have considered the question, the universal conclusion is that admiralty law does not apply to these torts. We need not retrace the steps taken by the Eleventh Circuit in Harville nor ours in Unarco to show why the nexus prong of Executive Jet has not been satisfied here; suffice it to say that the facts here are essentially the same as in the other cases cited which found that lack of sufficient relation to traditional admiralty concerns negated the

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7. Judge Campbell feels that it is not necessary to fully adopt the Harville approach and would prefer to rest on Unarco.

application of admiralty law.[8] We find

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8. The one quarrel we have with some of our sister circuits is the emphasis they placed on long-term, latent occupational disease as not bearing sufficient maritime connection. See, e.g., Woessner v. Johns-Manville Sales Corp., 757 F.2d 634, 647 (5th Cir. 1985) ("the type of injury involved here bears little if any relationship to maritime navigation or commerce"). We disagree most strongly with this view and point to, e.g., one of that circuit's own cases, Castorina v. Lykes Brothers Steamship Corp., 758 F.2d 1025 (5th Cir. 1985) (Wisdom, J.), where the plaintiff had for many years offloaded sacks of raw asbestos shipped in loose weave burlap bags aboard defendant's ships. Plaintiff's asbestosis was clearly caused by "traditional maritime activity." We think that the proper analytical step is to ask whether the causation of the injury had a sufficient connection to traditional maritime activity, not whether the type of injury, e.g., trauma, latent occupational disease, possessed the necessary nexus. We think that the concern Congress expressed in the 1984 Amendments to the Longshore Act over the difficulties that maritime workers were experiencing in gaining compensation for latent occupational disease bolsters the case for not using the type of injury as part of the hurdle for maritime tort actions. See H.R. Rep. No. 98-570, on P.L. 98-426, 98th Cong., 2d Sess., reprinted

(Footnote 8 Continued on Next Page

it rather ironic, however, that in those other course-making cases it was the asbestos companies who were urging that admiralty law did not apply to the injuries in the primary actions, and now we find basically the same defendants attempting to refute their own prior position. The tort cannot be outside admiralty jurisdiction when sued upon in the primary action and then, by some magic, be transmuted into a maritime tort merely because it is later emphasized that some of the work where the injury occurred was performed upon a ship. That the employees worked primarily upon ships had already been taken into account in

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(Footnote 8 Continued from Previous Page) in U.S. Code, Cong. & Ad. News 2734, 2743 (The Committee "has amended the current law in several significant respects to insure that long-latency occupational disease claimants do not continue to encounter the severe procedural hurdles which the Longshore Act has presented in the past").

the earlier analysis. Our conclusion, then, is that the injury sustained by Drake lacked sufficient connection to the traditional concerns of admiralty, and thus, neither plaintiff nor defendants can bring a § 905(b) negligence action against BIW qua shipowner pro hac vice.

We recognize that there are cases which have either ignored or overlooked the Executive Jet nexus test in determining whether a tort was cognizable under § 905(b). These are Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981),[9] McCarthy v. The Bark Peking,

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9. In Lundy the plaintiff was injured on a vessel which was 97% complete but which had not completed sea trials. The district court had held that an incomplete vessel was not a "vessel" within the meaning of § 905(b) and barred the action. The Fifth Circuit disagreed in a short per curiam opinion, holding that the definition of "vessel" provided in the definitional-section of the LHWCA, 33 U.S.C. § 902(21), encompassed torts suffered on an incomplete vessel such

(Footnote 9 Continued on Next Page

716 F.2d 130 (2d Cir. 1983),[10] and Hall

(Footnote 9 Continued from Previous Page)
as occurred there. The court determined that deciding whether a § 905(b) action was properly-brought was merely a matter of turning to the definitions for "vessel" and "covered employee," and if these elements were satisfied, the action could proceed. Whether § 905(b) encompassed only maritime torts was not raised before the panel, nor did the court consider the question sua sponte.

10. In McCarthy, a painter was injured while painting the mainmast and spars of the Bark Peking, a vessel permanently anchored and used as a museum. The Second Circuit had originally held that the plaintiff was not a covered employee for purposes of LHWCA compensation, and thus the § 905(b) action could not be brought. The Supreme Court vacated the initial decision for reconsideration in light of Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983), which is an opinion discussing the "status" requirement for LHWCA compensation. On the second trip, the Second Circuit ruled that Perini required that plaintiff be held a covered worker for compensation purposes. The McCarthy court apparently was not asked, and did not consider whether § 905(b) jurisdiction required that the Executive Jet nexus test be satisfied. It is likely that McCarthy has been implicitly

(Footnote 10 Continued on Next Page

v. Hvide Hull No. 3, 746 F.2d 294 (5th Cir. 1984). Of these, only the Hall opinion requires discussion, for it utilizes and extends the analysis used in the prior two cases.

In Hall, the defendant ships were actually hulls floating on navigable water during shipbuilding construction. The question before the court was the same as that in Lundy, viz., whether ships under construction qualified as vessels under § 905(b). The court felt that it was bound by Lundy's holding that torts committed on vessels under construction were cognizable under § 905(b), despite other Fifth Circuit authority holding that maritime tort

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(Footnote 10 Continued from Previous Page) overruled by Congress in the 1984 Amendments to the Longshore Act. See Pub. L. No. 98-426, 98th Cong., 2d Seas.; H.R. Rep. No. 98-570, which proscribes compensation coverage for museum employees.

jurisdiction required satisfaction of the Executive Jet criteria, including a relationship to traditional maritime activity:

> The panel agrees that we are bound by Lundy and that, under the law of the circuit, it must be followed in the absence of en banc overruling. However, the panel also notes that an issue of bancworthy dimension may be presented by the conflict between Lundy's rationale and some expressions in our more recent jurisprudence that an injury to ship construction workers on board a vessel under construction, although on navigable waters, is not a maritime tort, since ship construction is not a maritime business. See, e.g., Lowe v. Ingalls Shipbuilding, A Division of Litton, 723 F.2d 1173, 1185, 1187 (5th Cir. 1984).

Id. at 296 (footnote omitted). The panel's signal for rehearing en banc went unheeded. 746 F.2d at 294 (5th Cir. 1985).

The Hall court attempted to square Lundy with Lowe and Parker v. South Louisiana Contractors, 517 F.2d 113, the

Fifth Circuit's other cases, by asking the question whether § 905(b) jurisdiction extended beyond maritime tort jurisdiction as demarcated by Executive Jet. The court noted that torts occurring on vessels under construction qualified as maritime torts under pre-Executive Jet standards, citing to Williams v. Avondale Shipyards, Inc., 452 F.2d 955, where a ship construction worker working on a launched but uncompleted vessel floating in navigable waters was held entitled under general maritime negligence principles to sue the vessel or its owner for injuries sustained while on the uncompleted vessel in navigable waters. Id. at 958-59. It then declared that the principles of Director, OWCP v. Perini North River Associates, 459 U.S. 297, 320 n.29 (1983), which held that Congress lacked an intention to constrict the boundaries

for LHWCA compensation from those operative pre-1972, were applicable as well to maritime tort jurisdiction under § 905(b). In particular, the Hall court held that the statutory language of § 905(b), which was enacted subsequent to the Williams opinion, was intended to preserve the extent of maritime jurisdiction over a vessel under construction for § 905(b) purposes that had been previously recognized by Williams.[11] Thus, despite Executive Jet's addition of the nexus requirement and the holding of Lowe within its own circuit that ship construction is not a maritime business, the Hall court held that the former range of maritime torts caused by vessel negligence were intended to be grandfathered-in to the § 905(b)

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11. The Hall court did not cite any legislative history to bolster its position.

jurisdictional range and qualify as maritime torts. 746 F.2d at 300.

Insofar as the Hall panel held that only maritime torts are cognizable under § 905(b) we are in agreement. Our disagreement lies in that court's creation of a double standard for maritime tort jurisdiction. For actions brought under § 905(b) the Fifth Circuit would apparently revert to pre-1972, and pre-Executive Jet standards and apply only a situs test; for actions under general maritime jurisdiction, it would require satisfaction of both the situs and nexus tests.

We discern no basis for this construction of the jurisdictional range of § 905(b). Perini was concerned solely with compensation, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct, see infra at 25-26. We have uncovered no

legislative history even intimating that Congress wished to incorporate into § 905(b) the then-current boundaries of maritime tort jurisdiction, and place them beyond the traditional common law powers of the admiralty courts. Under the Fifth Circuit's construction, § 905(b) tort jurisdiction is static and distinct from other maritime tort jurisdiction, and a double standard has been created. This is the inevitable result of the Hall rule even though that court itself states that "we find no . . . distinction intended by Congress between a § 905(b) action and admiralty jurisdiction," 746 F.2d at 300. We have discovered no predicate for the Fifth Circuit's unusual rule in law, logic, legislative history, or policy and we decline to hold that jurisdiction under § 905(b) requires satisfaction merely of

the definitional elements of the provision, and the situs requirement.[12]

The other theory that has been advanced, and uniformly rejected, maintains that when Congress enlarged shoreward the geographic areas where compensation would be payable under the Act as a part of the 1972 Amendments, it implicitly adopted the same geographic range for § 905(b)'s scope. See, e.g., Parker v. South Louisiana Contractors, 537 F.2d 113 (discussing theory that § 905(b) jurisdiction and compensation system-covered areas parallel one

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12. It is inherently difficult to identify a congressional intention to tie § 905(b) jurisdiction to pre-Executive Jet boundaries since § 905(b) was enacted prior to the rendering of the Executive Jet and Foremost Insurance) decision(s). Thus, there was no predicate for the intention the Fifth Circuit ascribes to Congress except as a hypothetical, and none was recorded in the legislative history of the statute.

another). It is not clear whether appellants here subscribe to this or another theory of § 905(b)'s scope; they all but omitted argument on this point and made only the generalized claim that no independent admiralty jurisdiction had to be shown. In any event, an extended response is not necessary.

While the geographic extension shoreward of the range of areas where compensation would be payable under the Act was discussed in great detail in legislative hearings and committee reports, see, e.g., Perini, 459 U.S. at 314 n.24, 317-22; see also Herb's Welding Inc. v. Gray, 53 U.S.L.W. 4275, 4277 (U.S. March 18, 1985), there is no discussion of extending the jurisdictional range of torts cognizable under § 905(b) via negligence actions beyond that allowed for other maritime torts. The one example the House

Committee provided to illustrate its conception of the scope of § 905(b) negligence actions was that of a stevedore who slipped on an oil spill on a vessel's deck while loading or unloading cargo--a classic maritime tort. See H.R. Rep. at 2704. Moreover, the express purpose of enacting § 905(b) was to undo the judicial decisions in Sieracki and Ryan, and their unseaworthiness progeny, id. at 4703, which comprise a species of maritime tort.

Interpreting the scope of § 905(b) jurisdiction to include negligence actions other than maritime torts would federalize torts in an area which currently are governed by state law. We find it difficult to believe that a move this momentous, had Congress intended it, would not have received explicit discussion. Moreover, the Supreme

Court's comments in Victory Carriers directly counsel against an extension of admiralty jurisdiction on such slender evidence as advanced here:

> We are dealing here with the intersection of state and federal law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondents a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, [and] would raise difficult questions concerning the extent to which state law would be displaced or preempted . . . . In these circumstances, we should proceed with caution in constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

Victory Carriers, 404 U.S. at 211; see also Austin v. Unarco, 705 F.2d at 13. We agree with the Fifth Circuit's views as expressed in Parker v. South Louisiana Contractors, 537 F.2d 113, that there is no evidence that Congress intended to extend § 905(b) tort jurisdiction to encompass the shoreside injuries

occurring on a vessel merely because those injuries would be compensable under the LHWCA.

II. LIABILITY OF BIW IN ITS CAPACITY AS EMPLOYER

We now turn to the land-based third-party negligence claims alleged in Counts I through V, which challenge acts or omissions of BIW in its capacity as an employer. There can be no question that if the MWCA is the governing law, it bars these actions. Section 4 of the Maine Act states that employers who provide workers' compensation "shall be exempt from civil actions because of such injuries either at common law or under sections 141 to 148, under Title 14, sections 8101 to 8118 or under Title 18-A, section 2-804." Me. Rev. Stat. Ann.

tit. 39, § 4 (1978).[13] This provision has been unequivocally interpreted by the Maine Supreme Judicial Court to provide a covered employer with immunity from third-party claims arising from work-related injuries to its employees that "extends to all non-contractual rights of contribution and indemnity." McKellar v. Clark Equipment Co., 472 A.2d at 416; Roberts v. American Chain & Cable Co., 259 A.2d at 51.

Defendants do not dispute the effect of the Maine statute, but argue that it does not apply. Their argument, as we understand it, runs as follows: Plaintiffs' claim for workers' compensation was made under the Longshore

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13. The statutes identified in § 4 relate to employers' liability in the absence of workers' compensation, actions under the Maine Tort Claims Act, and actions for wrongful death.

Act, 33 U.S.C. 88 901-950, not the Maine Act; therefore, it is the LHWCA that is implicated. This means that it is the exclusivity provision of the LHWCA, § 905(a),[14] that controls and under Lockheed Aircraft Corporation v. United States, 460 U.S. 190 (1983), § 905(a) does not bar third-party actions.

Since the linchpin of defendants' argument is Lockheed, we turn first to that decision. Lockheed involved the crash of a plane manufactured by Lockheed Aircraft Corporation and owned and

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14. The pertinent part of 33 U.S.C. § 905(a) provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, . . .

operated by the United States Air Force. The administrator of the estate of a civilian employee of the United States Navy killed in the crash brought suit against Lockheed as the manufacturer of a defective product. Lockheed brought a third-party indemnity action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§§ 1346(b), 2671-80. The question was whether the exclusivity provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), barred Lockheed's indemnification action. In holding that it was not a bar, the Court relied heavily on Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, which had "considered FECA's exclusive-liability provision and carefully reviewed its legislative history." Lockheed, 460 U.S. at 194. The Court stated:

> The Court's reasoning in Weyerhaeuser applies with equal

> force in the present case. The Government advances the same arguments before us now that it unsuccessfully advanced in Weyerhaeuser. To paraphrase the Weyerhaeuser Court's conclusion, "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of [tort] law affecting the mutual rights and liabilities of private [parties] in [indemnity] cases." Id., at 601. Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. These are the only categories of parties who benefit from the "quid pro quo" compromise that FECA adopts.

Lockheed, 460 U.S. at 196 (footnotes omitted).

Defendants seize upon this language to argue that Lockheed swept away the third-party bar of § 905(a) along with that of § 8116(c) of FECA. We disagree. We first point out that neither Weyerhaeuser nor Lockheed implicated the LHWCA. Secondly, the Court stressed

twice in the course of its opinion that the underlying substantive law granting Lockheed a right to indemnification was uncontroverted, 460 U.S. at 192, 199 n.8, and the only question for decision was whether § 8116(c) of FECA interposed a bar to a third-party action against the United States. The holding in Lockheed is carefully and precisely worded:

> The District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in Weyerhaeuser, and hold only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States. We reverse the judgment of the Court of Appeals and the case for further consideration consistent with this Opinion.

460 U.S. at 199. Lockheed requires that we determine whether there is a basis in substantive law for defendants' third-

party action against BIW; it does not overrule three decades of consistent Supreme Court jurisprudence regarding the interpretation of § 905(a).

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BIW's employees are concurrently covered by the MWCA and the LHWCA. In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 716 (1980), the Court, in a unanimous opinion, held that "a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U. S. C. §§ 901-950." After tracing the "evolution of the law of compensation for workers injured in maritime precincts," id. at 717, the Court concluded: "We therefore find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal

jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the Jensen doctrine." Id. at 722 (footnote omitted). In Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), the Court held that states are constitutionally barred from applying their compensation systems to maritime injuries and thus interfering with overriding federal policy of a uniform maritime law. The Sun Ship Court emphatically rejected the argument that for compensation "jurisdictional exclusivity is - in 'fact' or in 'law' - implied in the LHWCA." Sun Ship 447 U.S. at 723; see also id. at 723-26.

The holding and reasoning of Sun Ship compel the conclusion that the applicable substantive law here is both the MWCA and the LHWCA. Since there can be no doubt that the Maine Act bars this third-party

action, our next inquiry is as to the effect of § 905(a).

The question is whether a nonvessel tortfeasor who may be found liable for injuries to employees of a LHWCA-covered employer has a right to indemnity or contribution from the employer. Section 905(a) provides in pertinent part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . . [Emphasis added.]

Our review of the case law under § 905(a) shows a nearly interpretation of the statute prior to Lockheed. The first Supreme Court case addressing the right of contribution in light of the LHWCA is Halcyon Lines v. Haenn Ship Ceiling &

Refitting Corp., 342 U.S. 282 (1952). The facts are simple: an employee of Haenn was injured on one of Halcyon's ships while making repairs; the employee sued Halcyon on the grounds of negligence and unseaworthiness; the jury found Haenn 75% and Halcyon 25% liable. The Court declined to apply the admiralty collision doctrine "that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third-parties," id. at 284, and stated categorically that a right of contribution did not exist in maritime, noncollision cases. Noting the extensive legislation in this field, i.e., the Harbor Workers Act, the Jones Act, the Public Vessels Act, the Limited Liability Act, and the Harter Act, the Court held: "In view of the foregoing, and because Congress while acting in the field has

stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." Id. at 287. Although the Court did not reach the issue of the impact of § 905(a), later decisions have explained that Halcyon stands for the principle that contribution actions against the compensation-paying employer are barred by § 905(a).

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974), was one of these explanatory decisions. The Supreme Court clarified that "despite the occasional breadth of its dictum, . . . Halcyon stands for a more limited rule than [an] absolute bar against contribution in noncollision cases . . . ." Id. at 111. The Court recognized instead "the well-established maritime rule allowing contribution between joint tortfeasors." Id. at 113.

But this rule was limited by the exclusivity provision of the LHWCA when contribution was sought from the compensation-paying employer of the injured worker. The Cooper Court pointed out that this result was reached in Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340 (1972), where "Erie, against whom contribution was sought, was the plaintiff's employer . . . ." Cooper, 417 U.S. at 114. The Court stated that it had ruled Erie to be "entitled to the limitation of liability protections of the Harbor Workers' Act, just like the employer in Halcyon." Id. And again, it stated, "Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions." Id. at 115. The Court concluded by saying that "Atlantic proves only that our decision in Halcyon was, and still is, good law on its

facts." Id. This interpretation of Halcyon and Atlantic was later reaffirmed in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), where the Court stated: "We . . . held that the shipowner could not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer. Halcyon Lines . . . ." Id. at 261.

We note that our construction of § 905(a) is in accord with the most recent authoritative expressions of Congress. Senator Nickles, the chair of the Senate Labor Subcommittee and one of the managers of the 1984 Amendments to the Longshore Act, explained the conference committee's concerns to the Senate:

> The conferees were also concerned over the effect of the Supreme Court's decision in Lockheed Aircraft Corp. v. United States et al, -- U.S. --, which decided that the Federal

> Employees' Compensation Act did not bar third party claims for indemnification. Because section 5(a) of the Longshore Act contains nearly identical language to FECA, we considered an amendment to section 5(a). However, the plain meaning of the existing language indicates that there should be no third party liability. In addition, the clear congressional intent of the 1972 amendments to the act was to eliminate the problem of "circular suits" whereby employers paid workers compensation and then through suits by third parties became liable for additional amounts.

130 Cong. Rec. 11621 (daily ed. Sept. 20, 1984).

The Courts of Appeals, so far as we can determine, also have interpreted § 905(a) to bar contribution, and some forms of indemnity, from an LHWCA employer. See, e.g., Zapico v. Bucyrus-Erie Co., 579 F.2d 714-19 (2d Cir. 1978) (Friendly, J.); Watz v. Zapata Off-Shore Co., 431 F.2d 100, 120 (5th Cir. 1970); Horton & Horton, Inc. v. T/S J.E. Dyer, 428 F.2d 1131, 1133-34 (5th Cir. 1970);

see also American Mutual Liability Insurance Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); St. Julien v. Diamond M. Drilling, 403 F. Supp. 1256, 1259 (E.D. La. 1975). In these and other cases, frequently a distinction has been drawn between contractual (express or implied) indemnity, and noncontractual indemnity. Where indemnity is sought on the basis of an express or implied contract, the indemnity action has been held to proceed not "on account of injury," § 905(a), to the employee but because of the contract. See, e.g., Pippen v. Shell Oil Co., 661 F.2d 378, 386-88 (5th Cir. 1981); Zapico v. Bucyrus-Erie Co., 579 F.2d at 718, 721-22.

Here, defendants sue only for contribution and noncontractual indemnity. Based on the principles of Halcyon and Atlantic, as interpreted by Cooper Stevedoring and Edmonds, we rule

that the contribution claims against BIW in its capacity as employer are barred by the exclusive-remedy provision of the LHWCA, 33 U.S.C. § 905(a). As far as the noncontractual indemnity claims are concerned, the facts presented here compel us to characterize them as tort based contribution claims, see supra note 2. Accordingly, these claims are also barred by § 905(a).

Because the exclusivity provisions of both the Maine Act, § 4, and the federal LHWCA, § 905(a), bar these third-party claims against BIW qua employer, we have no need to reach the question whether the LHWCA preempts an inconsistent state exclusivity provision.

We have carefully considered defendants' other claims for relief and find them without merit. As far as the pro tanto claim is concerned, we note that the Maine Supreme Judicial Court has

very recently rejected defendants' position. See Diamond International Corp. v. Sullivan & Merit, Inc., No. Ken-84-358, slip op. (Me. June 6, 1985).

The judgment of the district court dismissing the third-party complaint is affirmed.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1779

IN RE:

ALL MAINE ASBESTOS LITIGATION (PNS CASES)

UNITED STATES OF AMERICA,
Petitioner.

Before

Campbell, Chief Judge,
Coffin, Bownes, Breyer* and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: October 30, 1985

The petition for rehearing and rehearing en banc is denied.

Petitioner asserts that an analysis under Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984), would indicate that its third-party claim bears a sufficient relationship to traditional maritime activity. It seeks

to distinguish the cases we cite on the ground that they have not involved a suit by a shipyard worker against a shipowner for failure to warn of dangers of asbestos on ships brought to a yard for repair.

We pass over the question whether the absence of an actual suit against BIW by plaintiff would itself defeat petitioner's third party claims. We proceed to what we deem the controlling Harville factor in our cases, whether the need for uniformity in maritime commerce mandates application of admiralty law. Although petitioners make a reasonable argument that a shipowner's duty to warn workers of dangers hidden on board should be governed by a uniform maritime law, we think the better approach is to see this as a situation appropriately left to state tort law. If Drake has sued BIW as pro hac vice vessel owner for failure to

warn or protect against a dangerous condition, the questions would have been whether working with asbestos was dangerous and whether BIW knew or should have known of it. These are the same questions that would arise if Drake had worked with asbestos, without warning or protection, on a ship now owned by BIW, or in one of BIW's warehouses on land. As the court in Harville noted, the issues that such litigation would have presented "are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." Harville, 731 F.2d at 786.

Petitioner notes on page 14 of the petition that the "Court on its own motion reviewed documents in the district court" and seems to suggest that this was beyond our scope of review. The only material that was forwarded to the clerk

of the court of appeals for review was the appendix. Because of the importance of the case, the court felt that it would be wise to examine the entire record. In order to do this, the record had to be obtained directly from the clerk of the district court in Portland, Maine. It is the custom of this court, in cases that require it, to examine the record in detail and not to rely entirely on the appendix.

By the Court,

Francis P. Scigliano

Clerk.

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*Circuit Judge Stephen Breyer did not participate.

[cc: Messrs. Cox, Silberfeld, Furey and Fogarty]

APPENDIX F

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

Article III, Constitution of the United States, Section 2

Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between citizens of different States, - between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under

such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Statutory Provisions

5 U.S.C. § 8116(c) (1980)

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

28 U.S.C. § 1346(b)(1965)

. . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exlusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2764 (1965)

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission

complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

33 U.S.C. § 905 (1978) (current version at 33 U.S.C. § 905 (Supp. 1985))

Exclusiveness of liability

(a) .The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in

admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of

all other remedies against the vessel except remedies available under this chapter.

46 U.S.C. § 740 (1978)

Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been

presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

46 U.S.C. § 742 (1978)

Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such

corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

46 U.S.C. § 781 (1978)

Libel in admiralty against or impleader of United States

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensaiton for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. § 782 (1975)

Venue of suit; application of provisions of chapter 20

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of

business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

Me. Rev. Stat. Ann., Tit. 39, § 4

Applicability to certain actions and employers; exemptions

An employer who has secured the payment of compensation in conformity with sections 21-A to 27 is exempt from civil actions, either at common law or under sections 141 to 148, Title 14, sections 101 to 8118, and Title 18-A, section 2-804, involving personal injuries sustained by an employee arising out of and in the course of his employment, or for death resulting from those injuries. This exemption from liability applies to all employees, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries. These exemptions also

apply to occupational diseases sustained by an employee or for death resulting from those diseases.